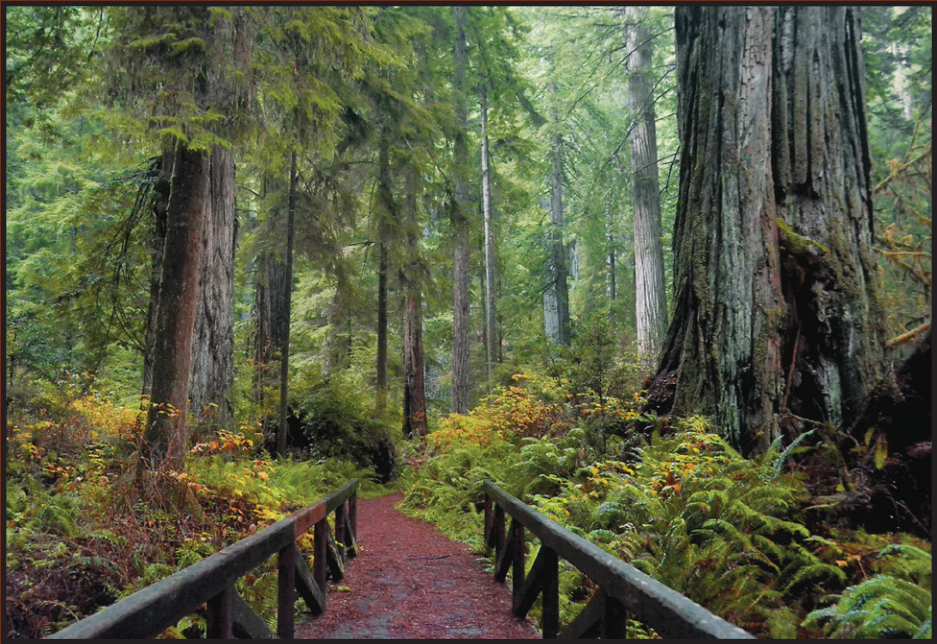


VOLUME 13: 2018

CALIFORNIA LEGAL HISTORY



JOURNAL OF THE
CALIFORNIA SUPREME COURT
HISTORICAL SOCIETY

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VOLUME 13
2018

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California Legal History is published annually by the California Supreme Court Historical Society, a non-profit corporation dedicated to recovering, preserving, and promoting California's legal and judicial history, with particular emphasis on the California Supreme Court.

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 ISSN 1930-4943

California Legal History is indexed in *The Index to Legal Periodicals*.

Design and Production: E. M. Holland

Cover Photo: "Prairie Creek Trail in the Fall" by Ginny Dexter — Prairie Creek Redwoods State Park, Humboldt County, California. By permission of Save The Redwoods League.

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ENVIRONMENTAL
LAW

ARTICLES SECTION

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT AT 40

KATHRYN MICKLE WERDEGAR*

I'm delighted to be here with my distinguished fellow panelists to join in a discussion of CEQA at 40. It's been observed that, although early on the California Supreme Court played an active role in interpreting and shaping CEQA, in the years that followed there was something of a hiatus in the court's CEQA jurisprudence, until the last five or six years, during which the court has issued a number of CEQA opinions.

First, I would like to briefly revisit the court's seminal CEQA cases, decided in the 1970s, the cases that set the stage for all that was to follow. Next, I'll describe the court's internal procedures for granting review and assigning cases. Finally, I'll touch on some of the principles established in our recent CEQA decisions.

* Associate Justice, California Supreme Court, 1994–2017. Remarks delivered at the State Bar of California Environmental Law Section 2010 Environmental Law Conference at Yosemite®, Session 2: “CEQA Turns 40,” October 22, 2010 (with co-panelists Susan Brandt-Hawley, Kip Lipper, James G. Moose, Ronald B. Robie, and Lisabeth D. Rothman).

I. INSIDE THE COURT

A. HOW CASES COME TO US

Before the Supreme Court can address an issue, of course, one of the parties in the case has to petition for review. Someone has to bring a lawsuit challenging an agency's CEQA compliance, the party losing in the trial court has to appeal, and the loser in the Court of Appeal has to petition us. We receive approximately 7,000 petitions a year, and we grant approximately one to two percent. Under our rules, a case is grantworthy (1) if there is a conflict among the lower courts, or (2) the issue is a recurring one that needs to be resolved, or (3) the case poses a question of statewide importance that would benefit by our resolution. In other words, we grant review to secure uniformity of decision or to settle an important rule of law.

B. CEQA GRANTS

With respect to CEQA cases, as I mentioned, the court's decisional output has fluctuated over the years. In the early days, right after CEQA's enactment, the Supreme Court accepted a number of cases involving the act, starting of course with the monumental *Friends of Mammoth*.¹ Until *Friends of Mammoth*, CEQA was thought to apply only to public works projects. *Friends of Mammoth* put an end to that, with the court holding that the act applied as well to governmental agency approval of private projects. We also articulated the principle that CEQA "must be interpreted to afford the fullest possible protection to the environment within the reasonable scope of statutory language."² Had we been wrong, the Legislature could have said so. Instead, it codified our decision.

After *Friends of Mammoth*, the next case to come before us was *No Oil, Inc. v. City of Los Angeles*,³ involving off-shore drilling of test oil wells, a project the trial court ruled did not require an Environmental Impact Report ("EIR"). In *No Oil* we rejected the trial court's standard that an EIR is required only if "there is a reasonable possibility that the

¹ *Friends of Mammoth v. Board of Supervisors of Mono County*, 8 Cal.3d 247 (1972).

² *Id.* at 259.

³ *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68 (1974).

project will have a momentous or important effect of a permanent or long enduring nature,'”⁴ and adopted the rule that an EIR is required if there is “‘substantial evidence that the project “may have a significant effect” environmentally,’”⁵ and this is so even if there also is substantial evidence supporting the contrary conclusion of no significant environmental impact.

The same year as *No Oil*, 1975, we decided *Bozung v. Local Agency Formation Commission*,⁶ involving a city’s annexation of agricultural land where a development was proposed and was expected to occur “within the near future.” in *Bozung*, we held that CEQA requires an EIR before any governmental activity — in this case, annexation — that may have as its *ultimate* consequence a physical change in the environment, and we also held that an EIR must be prepared at the earliest possible stage in the sequence of governmental actions that might lead to development. Finally, the last in this series of early cases was *Wildlife Alive v. Chickering*,⁷ decided in 1976, where we held exemptions from CEQA are to be narrowly construed.

The net result of these cases was that CEQA should be broadly construed to effectuate its purpose of environmental protection, and exemptions to CEQA should be narrowly construed. After this early activity, the court in the ensuing decades issued only a few CEQA opinions, until the last five or six years. The question seems to be if there is a particular reason.

Some have speculated that the composition of the court might explain our willingness or disinclination to take CEQA cases, but I would argue that’s simply not the case. While the court’s composition might affect *how* a case is decided, it doesn’t affect whether to grant review. Basically, we grant the cases that need to be decided. When there’s a conflict we almost always grant review. An exception might be when it appears the trend in the Courts of Appeal is in a particular direction, and we agree with the trend, so it appears likely the issue will be resolved without our input. Other reasons not to take an otherwise grantworthy case are (1) that the case is

⁴ *Id.* at 78.

⁵ *Id.* at 75.

⁶ 13 Cal.3d 263 (1975).

⁷ 18 Cal.3d 190 (1976).

not a good vehicle, in that it has some procedural problem or unusual facts that would preclude a clear statement on the point, or (2) there's recent legislation that has resolved the question, or (3) the court decides to let the issue "percolate" in the Courts of Appeal so we can have the benefit of the lower courts' views.

In the early years, there were a number of questions concerning the scope and application of the new law that needed addressing and which the court evidently felt were appropriate for judicial resolution. As time went on, these questions became fewer and so did petitions to our court.

C. CONFERENCE AND ASSIGNMENT OF CASES

So, let me take you to our Wednesday morning conference. Every Wednesday morning, we meet in the chief's chambers to discuss and vote on petitions for review. The number of petitions can vary from 150 (this past week) to over 500 (two weeks ago, when we had a double conference). Of course, we have our "A" list and our "B" list, the "A" list petitions being those that we expressly consider at conference and the "B" list being those that are deemed routine and are not discussed. Four votes are required to grant a petition. If a petition is granted, after conference the chief justice assigns the case to one of the justices who voted to grant.

We don't know exactly what the chief justice's system is, but no one has ever complained; well — with some few exceptions. At the least, he considers who is likely to write an opinion that will garner a majority, and he also considers each justice's work load.

No justice is considered an expert in an area of the law for the purpose of being assigned cases; in other words, we don't specialize, and even if we *think* we're a specialist, that holds no weight in the assignment process. Nor is it our practice for individual justices to request assignment of a particular case. Be that as it may, some kinds of cases do tend to be assigned in bunches. For a number of years, I seemed to be assigned all the SLAPP cases (Strategic Lawsuit Against Public Participation). I may at some point have said, "Please, don't SLAPP me again!" Others have complained of drowning in water cases. But this is all in fun. With respect to CEQA, for reasons unknown to me, of the court's twelve most recent CEQA opinions, I was the assigned author of seven.

D. FROM GRANT TO OPINION

Moving, then, from the grant of review to the opinion, what happens is that after the case is assigned and has been fully briefed, the assigned chambers prepares a so-called calendar memorandum setting out the issues and the arguments, the proposed analysis, and the assigned justice's tentative conclusion. The other justices then have 30 days to submit written preliminary responses, which can range from a straight concur with no comment, to concur with reservations, doubtful, or disagree, all of which require a statement of reasons. When the calendar memo has garnered a tentative majority, the case is set — or calendared — for oral argument. We confer on each case immediately after argument. If the assigned justice retains her majority, she drafts an opinion, which is then circulated, and any dissenting justice circulates a dissent. When everyone has signed one of the opinions, the case is filed.

II. THE COURT'S ROLE IN DEVELOPING CEQA

In the early years the court played an important role in the evolution of CEQA, addressing its substantive provisions and giving the law a broad scope. Today the cases that come to us involve not so much the meaning and scope of the law, but its proper application, both procedurally and substantively. Doubtless to the frustration of practitioners and agencies, many of the decisions are intensely fact specific and not amenable to “bright line” rules. But I'll mention a few established principles:

A. THE STANDARD OF REVIEW

First, the standard of review — judicial review of an agency's compliance with CEQA extends only to whether there was a prejudicial abuse of discretion. The court does not pass on the correctness of the EIR's environmental conclusions, but only on its sufficiency — procedurally or factually — as an informational document. A prejudicial abuse is established if the agency has not proceeded in a manner required by law, or if the agency's factual conclusions are not supported by substantial evidence. We review questions of law or procedure *de novo* and questions of fact for substantial evidence. The court's scrutiny, therefore, depends on the nature of the alleged defect.

In recent cases, we've reviewed de novo the following issues of law or procedure: whether an activity is a project (*Muzzy Ranch Co. v. Solano County Airport Land Use Commission*⁸); what is the proper baseline for CEQA analysis (*Communities for a Better Environment v. South Coast AQMD*⁹); what is the appropriate time for CEQA compliance (*Save Tara v. City of West Hollywood*¹⁰); is mitigation feasible and can an agency be responsible for mitigation of off-site impacts (*City of Marina v. Board of Trustees of the California State University*¹¹); the necessity for recirculation of a draft EIR after public consultation and input (*Vineyard Area Citizens v. City of Rancho Cordova*¹²); and whether the agency followed correct procedure in analyzing cumulative impacts (of a timber harvest plan, in its choice of assessment areas) (*Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry*¹³), to name only a few.

B. SUBSTANTIVE DECISIONS

We've also issued some substantive decisions:

(1) In *Muzzy Ranch* — we held CEQA may require lead agencies to consider the effects of “displaced development” resulting from restrictive land use policies, where such development can be reasonably anticipated.

(2) In *Communities for a Better Environment* — we held the proper baseline for CEQA analysis is actual conditions in existence, not previously permitted pollution levels.

(3) In *City of Marina* — we held an agency's mitigation responsibility may extend to off-site impacts.

(4) In *Save Tara* — we held an agency's substantial commitment to a public-private agreement for land use was an “approval” requiring an EIR, notwithstanding the agreement was conditioned on subsequent CEQA compliance.

(5) And in *Vineyard Area Citizens* — we established that an EIR must contain all its relevant information in one document so as to clearly

⁸ 41 Cal.4th 372 (2007).

⁹ 48 Cal.4th 310 (2010).

¹⁰ 45 Cal.4th 116 (2008).

¹¹ 39 Cal.4th 341 (2006).

¹² 40 Cal.4th 412 (2007).

¹³ 43 Cal.4th 936 (2008).

communicate the project's significant environmental effects, and we also outlined the information an EIR for a long-term land development project must contain concerning its proposed water sources and the environmental impacts of using those sources.

CONCLUSION

Let me conclude by saying that, as the cases come to the court, we will continue to take the ones that require resolution and do our best to clarify the law — admittedly not an easy task with CEQA. Thank you.

★ ★ ★

Honoring Justice Kathryn Werdegar for

LANDMARK DECISIONS INTERPRETING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

SUSAN BRANDT-HAWLEY AND JAN CHATTEN-BROWN*

We celebrate the legacy of Justice Werdegar on the California Supreme Court with gratitude. As each of her authored opinions interpreting the California Environmental Quality Act (CEQA) has issued, we — along with our colleagues practicing on all sides of California’s environmental bar — have marveled at their depth and breadth.

In 1970, the Legislature declared that California agencies shall “take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.”¹ Justice Werdegar’s comprehensive opinions impart in elegant and exacting prose an overarching respect for the mandates of CEQA combined with a pragmatic approach to its interpretation. Along with her leadership on a court that has issued many landmark environmental rulings, Justice Werdegar has authored an

* Jan Chatten-Brown, Chatten-Brown and Carstens, and Susan Brandt-Hawley, Brandt-Hawley Law Group, are CEQA practitioners in all California courts including the Supreme Court. Jan was lead counsel in the *Save Tara* case and co-counsel in the *Center for Biological Diversity* case, discussed here. Susan is vice-president of the California Academy of Appellate Lawyers.

¹ CAL. PUB. RESOURCES CODE, § 21001, subd. (b).

unprecedented number of CEQA opinions, addressing a wide range of environmental issues affecting water supply, rapid transit, oil refineries, historic resources, airports, university expansion, and, most recently, control of greenhouse gases. None of these topics are simple.

Many of Justice Werdegar's decisions address the varying standards of review in CEQA cases. The opinions also illuminate the act's substantive mandate, markedly different from the federal National Environmental Policy Act (NEPA), as CEQA requires California's public agencies not only to study projects' significant environmental impacts but to mitigate those impacts to the extent feasible.

Justice Werdegar's opinions also emphasize the Supreme Court's commitment to judicial enforcement of CEQA's mandates despite acknowledged costs. Recently, *Center for Biological Diversity v. Department of Fish and Wildlife (CBD)*² held that CEQA documents addressing Southern California's Newhall Ranch project were gravely flawed. In reversing the judgment, the *CBD* opinion held that the scope of the court's review "does not turn on our independent assessment of the project's environmental merits. . . . CEQA's requirements for informing the public and decision makers of adverse impacts, and [imposing] feasible mitigation measures, *still need to be enforced.*"³ As discussed below, Judge Werdegar's ruling led to a settlement of the Newhall Ranch project accomplishing significant environmental protections.

Beyond an unparalleled body of landmark CEQA rulings with direct effects on the cases at hand and enduring precedent shaping countless other projects, Justice Werdegar has contributed to environmental legal practice in seminars such as the 2010 State Bar Environmental Section's annual Yosemite Environmental Law Conference. In a panel convened in honor of the Act's 40th anniversary, Justice Werdegar reviewed CEQA's legacy and challenges with grace and warmth, to the delight of hundreds of environmental attorneys.⁴

While we will discuss some of Justice Werdegar's opinions, we can only hint at their substance and import in enforcing the mandates of CEQA

² 62 Cal.4th 204 (2015).

³ *Id.* at 204, 240 (emphasis added).

⁴ [Editor's note: see Kathryn Mickle Werdegar, *The California Environmental Quality Act at 40*, 13 CAL. LEGAL HIST. 3 (2018).]

to the great benefit of California's citizens and landscapes. On behalf of the environmental bar, and, if we may, on behalf of our environment, we honor and thank her.

★ ★ ★

MITIGATION AND CEQA'S SUBSTANTIVE MANDATE

Justice Werdegar authored two opinions addressing the duty of the California State University (CSU) to mitigate off-campus impacts of its significant expansion projects. The first was a unanimous opinion in *City of Marina v. Board of Trustees of the California State University*,⁵ with Justice Chin concurring. The ruling required CSU to mitigate the off-campus environmental impacts of campus expansions. The decision contributes to CEQA jurisprudence in many ways, addressing the standard of review for adjudicating EIR adequacy, the assessment of legal feasibility of project mitigation measures, and CEQA's substantive mandate that agencies adopt feasible mitigations *before* considering project approval based on considerations of public benefit.

The Fort Ord Reuse Authority (FORA) in Monterey County approved a capital improvement plan identifying roadways, utilities, and other infrastructure improvements for long-term development of the closed army base. The Army had transferred over a thousand acres to CSU for use as a new Monterey Bay (CSUMB) campus. FORA's capital improvement plan included infrastructure for the expanded CSU campus.

CSU prepared an EIR analyzing the impacts of adopting a Master Plan to substantially increase enrollment at CSUMB. The EIR concluded that expanding the campus would result in significant environmental impacts including: 1) drainage impacts from increased development-related runoff, 2) increased water supply demand, 3) increased traffic on off-campus roads, 4) increased sewage flows, and 5) need for increased fire protection. Identified mitigation measures called for improvement of the Fort Ord base infrastructure.

FORA contended that CSU should contribute \$20 million for its share for roads and fire protection. CSU refused to pay, asserting it was exempt

⁵ 39 Cal.4th 341 (2006).

from paying for road improvements or fire protection services and that any payment to FORA that was not specifically authorized by the Government Code was prohibited by the Constitution, would be an illegal gift of public funds, and was thus legally infeasible.

Acknowledging that environmental impacts would be significant and unavoidable, CSU approved the Master Plan based on a CEQA statement of overriding considerations, finding that off-campus environmental impacts would be outweighed by public benefits provided by the expanded university. CSU agreed to pay for water, sewer, and drainage improvements, but since CSU and FORA did not agree on the amounts for that infrastructure, CSU adopted a statement of overriding considerations as to those costs as well.

The nearby City of Marina joined with FORA in challenging CSU's actions in court, seeking contribution for the off-campus infrastructure costs of the campus expansion project. The Monterey County Superior Court granted the petition. The Court of Appeal reversed. FORA's petition for review was granted by the Supreme Court.

Justice Werdegar's opinion addressed the standard of review for considering the adequacy of an EIR: a question of law. "An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document."⁶ Underscoring CEQA's substantive mandate that projects with significant impacts cannot be approved without adoption of identified feasible mitigations and alternatives, the *City of Marina* opinion held — in a subsequently much-cited passage — that CSU had unlawfully adopted the statement of overriding considerations without first making findings as to whether the Master Plan's significant environmental impacts could be feasibly mitigated.⁷ The court stated:

⁶ *City of Marina*, 39 Cal.4th 341, at 366.

⁷ An earlier unanimous Supreme Court opinion authored by Justice Werdegar had also focused on CEQA findings for a statement of overriding considerations, on an ancillary procedural issue of whether appellants failed to exhaust remedies when they did not request reconsideration of an agency's findings at the administrative level. (*Sierra Club v. San Joaquin LAFCO*, 21 Cal.4th 489 (1999).) The Supreme Court reversed the Court of Appeal judgment, ruling that a petitioner need not request reconsideration to present "for the second time the same evidence and legal arguments one has previously raised solely to

CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible. Such a rule, even were it not wholly inconsistent with the relevant statute [citation] would tend to displace the fundamental obligation of "[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves . . . whenever it is feasible to do so' [citation]."⁸

The CSU Trustees abused their discretion in determining that the project's infrastructure effects could not feasibly be mitigated, as discussed below, and it necessarily followed that their statement of overriding considerations was invalid.

The *City of Marina* opinion ruled *as a matter of law* that CSU incorrectly treated mitigation of off-campus environmental impacts caused by its proposed expansion as legally infeasible. "CEQA requires the Trustees to avoid or mitigate, if feasible, the significant environmental effects of their project (Pub. Resources Code, § 21002.1, subd. (b)), and . . . payments to FORA may represent a feasible form of mitigation."⁹ As the lead agency, CSU had discretion to fix the appropriate amount of payments to FORA in light of CEQA's requirement that mitigation measures be "roughly proportional."¹⁰

CSU argued that mitigation payments were legally infeasible because there was no way to guarantee that FORA would implement the infrastructure improvements, particularly in light of "dispute[s]" regarding the implementation of this "regional mitigation."¹¹ As the EIR explained, the payments sought from CSU represented only a fraction of the money required to build the infrastructure called for by FORA's own capital improvement plan. But while paying a fee is not adequate mitigation unless accompanied by a reasonable mitigation plan, the record contained

exhaust administrative remedies . . ." (*Id.* at 510.) The case overruled the court's contrary decision in *Alexander v. State Personnel Board*, 22 Cal.2d 198 (1943). (*Id.*)

⁸ *City of Marina*, 39 Cal.4th 341, at 368–369.

⁹ *Id.* at 369.

¹⁰ CEQA GUIDELINES, § 15126.4, subd. (a)(4)(B).

¹¹ *City of Marina*, 39 Cal.4th 341, at 363.

evidence that FORA had in fact adopted such a plan and could implement it. The *City of Marina* opinion held that CSU committed an error of law by contending that CEQA requires more. While CSU's ability to make payments to FORA might be infeasible if the Legislature failed to appropriate money for that purpose, CSU was required to specifically seek such funding.

City of San Diego v. Board of Trustees of California State University,¹² another unanimous opinion authored by Justice Werdegar, is a successor to *City of Marina*. The CSU Trustees approved a significant expansion of the campus at San Diego State University that would contribute to significant off-campus traffic impacts. The City of San Diego sued CSU for refusing to reimburse the city for its share of the impacts.

As noted in the *City of San Diego* opinion, the primary issue in *City of Marina* was CSU's assumption that campus geographical boundaries define the extent of the CSU Board's duty to mitigate.¹³ At San Diego State, CSU refused to contribute to off-campus traffic mitigation based on language in *City of Marina*:

Fair-share mitigation is recommended that would reduce the identified impacts to a level below significant. However, the university's fair-share funding commitment is necessarily conditioned up[on] requesting and obtaining funds from the California Legislature. If the Legislature does not provide funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable.¹⁴

Anticipating that the Legislature might not make an earmarked appropriation for mitigation, given the resources already budgeted for campus expansion, the CSU Board found that off-campus mitigation for San Diego State traffic would be infeasible. It certified the expansion of the EIR based on a statement of overriding considerations that the project's benefits would outweigh its unmitigated significant impacts. The Supreme Court granted review. It ruled that the language being relied upon by CSU from its earlier decision in *City of Marina* was dictum that:

¹² 61 Cal.4th 945 (2015).

¹³ *Id.* at 957.

¹⁴ *City of Marina*, 39 Cal.4th 341, at 367.

does not justify the Board's assumption that a state agency may contribute funds for off-site environmental mitigation only through earmarked appropriations, to the exclusion of other available sources of funding. The erroneous assumption invalidates both the Board's finding that mitigation is infeasible and its statement of overriding considerations. Accordingly, we will affirm the Court of Appeal's decision directing the Board to vacate its certification of the EIR.¹⁵

The opinion thus held that the lack of a legislatively earmarked appropriation does not make mitigation costs legally infeasible and thus cannot satisfy CSU's duty to adopt feasible mitigation measures to address off-campus impacts.

STANDARD OF REVIEW FOR EIR ADEQUACY; REVIEW OF LONG-TERM WATER SUPPLY

Justice Werdegar's opinion in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*¹⁶ is among the most influential CEQA decisions issued by the court since CEQA was codified in 1970. Its clarification of procedural mandates that enforce CEQA's environmental protections has to date been relied upon in eight of the court's subsequent decisions and hundreds of appellate rulings. The opinion addresses CEQA's dual standards of review for EIR adequacy and the appropriate level of environmental review for a project's near-term and long-term water supplies. Justice Baxter concurred and dissented.

The court held that the EIR's analysis of the long-term water supply that would serve a 6,000-acre community plan was inadequate as a matter of law. The EIR improperly claimed to tier from a future regional water planning environmental document, failed to explicitly incorporate and/or tier from the discussion in another relevant EIR, and relied on a mitigation measure that would curtail development if an adequate water supply did not materialize without first analyzing the environmental impacts of such action.

¹⁵ *City of San Diego*, 61 Cal.4th 945, at 950.

¹⁶ 40 Cal.4th 412 (2007).

While CEQA does not require “assurances of certainty regarding long term future water supplies at an early phase of planning for large land development projects,”¹⁷ an agency cannot simply ignore or assume a solution to a water supply problem, but must provide enough information for decision makers to consider pros and cons of supplying water.¹⁸ EIR analysis must address both short- and long-term water supply, and the supplies identified cannot be “paper water” but must be reasonably likely to be available.¹⁹ Finally, if ultimately the availability of long-term water supplies is uncertain, the EIR must address the environmental impacts of securing possible replacement sources or alternatives to use of water.²⁰ The *Vineyard* opinion describes CEQA’s dual standards of review in detail. An adequate EIR requires strict compliance with law:

[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5.) *Judicial review of these two types of error differs significantly* In evaluating an EIR . . . a reviewing court must adjust its scrutiny to the nature of the alleged defect For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency “failed to proceed in the manner required by CEQA.” [Citations.] In contrast, in a factual dispute over “whether adverse effects have been mitigated or could be better mitigated” [citation] the agency’s conclusion would be reviewed only for substantial evidence.²¹

Under *Vineyard*, adequacy of an EIR analysis presents a question of law. However, once an adequate EIR is certified, an agency’s fact-based conclusions and CEQA findings as to the significance of environmental impacts and the feasibility of alternatives and mitigations are deferentially reviewed for substantial evidence.²² Here, the EIR’s analysis of the project’s

¹⁷ *Id.* at 432.

¹⁸ *Id.* at 431.

¹⁹ *Id.* at 432.

²⁰ *Id.*

²¹ *Id.* at 427 (emphasis added).

²² *Id.* at 435.

long-term water supply was not missing, but was held by the court to be insufficient as a matter of law.

STANDARD OF REVIEW FOR EIR ADEQUACY; PRECOMMITMENT

A community group filed *Save Tara v. City of West Hollywood*²³ to apply CEQA protections to a large white colonial-style home in an intensely developed part of West Hollywood. The facts were colorful and intriguing. The name Tara had long been associated with the house, both because of its appearance and because the owner, Mrs. Weismann, loved the movie *Gone with the Wind* and was reported to have died at 101 while watching it in the home where she had lived since she was a child. By that time, the home was a city-designated cultural monument and had been divided into four apartments. Her friends who lived in the other units helped take care of her.

During her lifetime, Mrs. Weismann willed Tara to the city. While she reportedly wanted the lush gardens around the home to be maintained and recommended that the property become a city park and the house used for public purposes, no such conditions were included in her grant to the city.

Upon acquiring possession of Tara after Mrs. Weismann's death, the city accepted a proposal by a private developer to develop thirty-five units of senior housing. The proposal called for demolition of an existing structure, removal of many of the mature trees, and construction of thirty-five of the units in a three- or four-story building that would wrap around the historic house. Such construction would have changed the context of the historic site and eliminate much of the verdant landscaping that was a treasured community oasis.

Area residents began a campaign to save the house and its surrounding urban forest, organizing themselves as Save Tara. At a hearing before the City Council, the group argued that the historic property should become a community center or library that would protect its monument status. They lost in a close vote before the City Council. Without conducting any CEQA review, the city entered into a development agreement with the private developer for a senior housing project to be called "Laurel Place." As part

²³ 45 Cal.4th 116 (2008).

of the agreement, the city committed to give the developer the land and financial support if it obtained HUD funding.

Save Tara's lawsuit challenged the city's approval of the agreement without first preparing an EIR and conducting a CEQA process. Save Tara lost in the trial court, but the Court of Appeal reversed, holding it unlawful for the city to enter into the agreement for the development of Tara prior to conducting CEQA review. A dissent argued that the case was moot because an EIR was prepared for the project while the litigation was pending.

The Supreme Court granted the city's petition for review. Justice Werdegard authored the now-landmark case for a unanimous court, holding that the proper timing of CEQA review is a question of law subject to independent judicial review, rather than a factual question entitled to agency deference. This important distinction between an agency's duty to follow the procedures required by CEQA versus its discretion to make factual determinations to be accorded deference built upon Justice Werdegard's directly referenced earlier decision in *Vineyard Area Citizens* that underscored CEQA's dual standards of review.

The *Save Tara* opinion then addressed whether the subsequent preparation of an EIR had mooted the appeal, and concluded that it had not because nothing irreversible had happened with the property.

The primary focus of the *Save Tara* opinion was whether the city had erred in approving a development agreement without first preparing and certifying an EIR. The opinion examined CEQA's statutory mandate that agencies must certify an EIR for any project that they intend to carry out or approve which may have a significant environmental effect. The opinion also considered CEQA's implementing regulations, the CEQA Guidelines, prepared by the Governor's Office of Planning and Research. The Supreme Court has repeatedly held that the Guidelines are entitled to great weight except where they are clearly unauthorized or erroneous. Guidelines section 15352 defines what constitutes an approval for purposes of CEQA, providing that for a private project an approval occurs "upon the earliest commitment to the issue by the public agency . . ." ²⁴ Guidelines section 15004 states that "EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental

²⁴ *Save Tara*, 45 Cal.4th 116, at 129.

considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.”²⁵

In reaching its decision that environmental review should have occurred before approval of agreements between the city and the developer, the *Save Tara* opinion disapproved three appellate cases that had allowed certain commitments to projects to be made before preparation of environmental review documents. The Supreme Court stated in prior decisions that the timing of environmental review required a delicate balance between having enough information and yet assuring that EIRs are not reduced to post hoc rationalizations to support action already taken. *Save Tara* holds that, “[w]hile an agency may certainly adjust its rules as to ‘the exact date of approval,’ an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR.”²⁶

Save Tara emphasized the importance of avoiding “bureaucratic and financial momentum” when environmental analysis is postponed.²⁷ Importantly, “[i]f, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project, then for purposes of CEQA the agency has ‘approved’ the project.”²⁸ In holding that a formal project approval is not needed to prove violation of CEQA, the opinion protects the integrity of CEQA that is threatened when EIRs become meaningless post hoc rationalizations for agency decisions that are already manifest.

Despite strong language regarding the need for timely environmental review, *Save Tara* also recognized certain exceptions to the general rule that development decisions having the potential to significantly affect the environment must be preceded rather than followed by CEQA review, focusing on CEQA’s reference to “commitment” in defining project approval. As the Court noted, CEQA was not “intended to place unneeded obstacles in the path of project formation and development.”²⁹ The *Save Tara* opinion noted the impossibility of establishing a “bright line” rule distinguishing between reasonable project planning and unlawful precommitment

²⁵ *Id.*

²⁶ *Id.* at 132.

²⁷ *Id.* at 135.

²⁸ *Id.* at 139.

²⁹ *Id.* at 137.

but made clear that exceptions to requiring early preparation of EIRs must not be allowed to swallow the rule.³⁰

Under the facts of the case, the city had sent a letter to HUD supporting the developers' application for funding and confirmed that it would give the applicant the land, then worth \$1.5 million, and invest up to \$1 million in additional support for the development. Without environmental review, eviction notices had been served upon tenants who shared the house with Mrs. Weismann. These were primary facts evidencing precommitment as a matter of law.

Beyond the beneficial impacts of the *Save Tara* decision on CEQA practice statewide, its impact on Tara itself was also significant. After the develop-

ment agreements were set aside, the city reappraised the project. However, the combination of changed project economics and escalating efforts by the community led to Tara's preservation. Today, it sits in a city park and its beautiful trees remain standing.



TARA HOUSE PARK, CITY OF
WEST HOLLYWOOD, CALIFORNIA

ANALYSIS OF GREENHOUSE GASES, THE “TAKING” OF FULLY PROTECTED FISH, AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

The final CEQA decision authored by Justice Werdegar, *Center for Biological Diversity, et al. v. Department of Fish and Wildlife*,³¹ addressed the Newhall Land and Farm project in the Santa Clarita Valley. The Newhall Ranch project has long been proposed as the largest new city in California, with 58,000 residents as well as commercial and business uses, all planned for 12,000 acres along the Santa Clara River. There have been many legal

³⁰ *Id.* at 138.

³¹ 62 Cal.4th 204 (2015).

challenges to the proposed project over many years. The Supreme Court's review involved approvals of a Resource Management and Development Plan and a Spineflower Conservation Plan by the California Department of Fish and Wildlife, challenged by the Center for Biological Diversity (CBD) and other environmental groups.

The decision involved three complex issues: 1) the adequacy of the Newhall Ranch EIR's analysis of greenhouse gases (GHGs); 2) application of state law to the three-spined stickleback, an endangered and fully protected species of fish in the Santa Clara River; and 3) application of CEQA's requirement to exhaust administrative remedies.

INADEQUACY OF GHG ANALYSIS

In 2006, California passed the landmark California Global Warming Solutions Act, commonly referred to as AB 32. The act calls for reduced GHG emissions to 1990 levels by 2020. AB 32 required the Air Resources Board (ARB) to prepare a "Scoping Plan" to determine maximum feasible and cost-effective reductions by 2020. It adopted a Scoping Plan in 2008 that established a "business as usual" model and calculated the percentage by which emissions would need to be reduced below that level.

The EIR calculated that the Newhall Ranch project would achieve a 31 percent reduction below "business as usual" GHG emissions, while the ARB Plan projected the need for a 29 percent reduction by 2020. While the EIR projected an increase in GHGs because of the project, it declined to determine what levels of emissions would be significant "because of the absence of scientific and factual information regarding when particular quantities of [GHGs] become significant."³² CBD challenged the GHG analysis for a variety of reasons, including the propriety of using the Scoping Plan model and what they believed to be inflated emission reductions that the project was expected to achieve. As to the use of the Scoping Plan, they argued that it was intended to demonstrate the extent to which existing sources would have to be reduced, and not what new emission sources would be acceptable without interfering with the state's climate objectives. CBD argued for some numerical threshold rather than compliance with the state's Scoping Plan.

³² *CBD*, 62 Cal.4th 204, at 222.

Justice Werdegar authored the Supreme Court's decision, rejecting CBD's argument that it was inappropriate to utilize the Scoping Plan's required reductions as a criterion for determining significance. But the opinion concluded that the EIR failed to support by substantial evidence its contention that project emissions would be reduced below the level of significance. Further, the Scoping Plan for reducing GHG levels statewide did not explicitly apply to what emission levels should be allowed from individual new projects without being considered significant. New sources *may* have to be more efficient than what can be achieved by the retrofit of existing sources, and it may be more cost-effective to achieve emission reductions from new rather than existing sources.

The *CBD* opinion footnoted legislation since passed to require the state to slash greenhouse gas emissions to 40 percent below 1990 levels by 2030. The opinion also notes the existence of the executive orders signed by both Governors Schwarzenegger and Brown. These orders set the goal of reducing GHG emissions to 80 percent below 1990 levels by 2050.

The opinion's rejection of DFW's GHG emission analysis challenges agencies to carefully consider how to prepare adequate EIRs, but the court gives substantial guidance to agencies and EIR preparers. Particularly helpful is the opinion's explication of "potential pathways to compliance." By way of example, an agency may determine significance by: 1) determining what level of reduction from "business as usual" a new development must achieve to comply with statewide GHG reduction goals; 2) assessing consistency with AB 32's goals by looking at compliance with regulatory programs with performance standards; 3) complying with locally adopted Climate Action Plans or Sustainable Community Strategies; or 4) relying on existing numerical thresholds of significance, rather than determining significance anew.

The *CBD* opinion also makes clear that even if an agency finds significant cumulative GHG impacts, it may still approve a project *if* it adopts feasible alternatives and mitigations.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The Court of Appeal ruled that two challenges to the EIR were not preserved under Public Resources Code section 21177, which sets forth the exhaustion of administrative remedies doctrine under CEQA. Subdivision (a)

provides that before an alleged ground for noncompliance may be brought it must have been “presented to the public agency orally or in writing by any person during the public comment period . . . or prior to the close of the public hearing on the project . . .” DFW held no public hearing. However, here a joint EIR/EIS was prepared by the DFW and the Army Corps of Engineers. National Environmental Policy Act (NEPA) regulations allow public comment on a final EIS at any time before the agency’s decision. During the Corps’ comment period, plaintiffs submitted comments on cultural resources and steelhead impacts.

DFW stated in the EIR that comments during the Corps’ comment period on the FEIS/EIR were given to Newhall and responses were prepared. The lead agencies then jointly prepared an addendum to the FEIS/FEIR, and the addendum was included in the revised FEIS/FEIR. The *CBD* opinion held that the court “need not decide whether every federally mandated comment period on a final combined EIS/EIR also constitutes a CEQA comment period for purposes of section 21177(a).” Here, the comments were adequate to exhaust remedies under CEQA because DFW treated the comment period as applying to CEQA issues. The *CBD* opinion underscored the purpose of the exhaustion doctrine, which is to lighten the load on the judiciary by providing a remedy at the administrative level. That occurred in this case.

THE INTERFACE BETWEEN THE FISH AND GAME CODE AND CEQA

DFW and Newhall argued that the capture and relocation of the unarmored three-spined stickleback was an appropriate mitigation measure. The *CBD* opinion concluded that such capture and relocation is not permitted by Fish and Game Code section 5515, which prohibits the taking or possession of the fish. DFG can collect and relocate endangered and special status species as a conservation measure, but not as a project mitigation measure. The opinion relied upon Fish and Game Code section 5515(a)’s provision that scientific research does not include any action taken as mitigation for a CEQA project as well as the definition of “take” in section 86 of the code as including pursue, catch and capture.

Of the ten CEQA decisions authored by Justice Werdegard during her twenty-three years on the Supreme Court, six decisions were unanimous.

In the *CBD* case, Justice Corrigan concurred and dissented and Justice Chin dissented.

Justice Corrigan agreed with the majority opinion as to the protection afforded by California law on the stickleback and the conclusion that use of AB 32 as a standard for determining significance of GHG impacts was proper. The justice disagreed that the decision that GHG impacts were not significant was not supported by substantial evidence. The majority opinion rejected Justice Corrigan's assertion that the court's analysis *required* greater GHG efficiency and noted that DFW failed to substantiate its assumption that the Scoping Plan's statewide emissions reduction target can also serve as the criterion for an individual land use project.

Justice Chin dissented both as to the GHG analysis and as to the protections for the three-spined stickleback. Regarding GHG emissions, he was especially concerned with the majority opinion's suggestion that agencies might have to look beyond compliance with GHG reduction goals for 2020. (It is worth noting that since the time of the decision, the Legislature has passed SB 32, which sets a GHG reduction goal for 2030 based upon achievement of the 2050 reduction goal.)

Justice Chin particularly expressed concern regarding what he characterized as an "inordinate delay of project." Writing for the majority, Justice Werdegar responded that appellate review of lower court CEQA rulings cannot turn on a court's "independent assessment of the project's environmental merits. Even if Newhall Ranch offered the environmentally best means of housing this part of California's growing population, CEQA's requirements for informing the public and decision makers of adverse impacts, and for imposition of valid, feasible mitigation measures, would still have to be enforced."³³

In September 2017, most of the petitioners in the *CBD* case entered into a settlement with Newhall that would surely be pleasing to Justice Werdegar. The project was dramatically revised in many ways to protect natural resources and reduce impacts. It sets a new standard for residential development by requiring that the project be a zero net GHG emitter, via a series of extremely stringent on-site emission strategies. Solar energy and electric charging stations and subsidies for electric vehicles will be a big part of

³³ *Id.* at 240.

the development. The project-related emissions will be offset by Newhall, with a preference for local, then state, and then national offsets. In addition to GHG emission reductions, the project was redesigned to preserve the stickleback without relocation, thus also reducing the impacts on the Santa Clara River. While the Court of Appeal on remand reaffirmed its decision on issues relating to steelhead trout and cultural resources, further protections of cultural and natural resources were built into the settlement and the project redesign will also aid the steelhead.

How was settlement achieved? The willingness of the Supreme Court to take a hard look at the adequacy of an agency's environmental analysis, and its attention to enforcement of the state's GHG reduction goals and species protection laws were powerful forces. The outcome of this case is a dramatic example of how enforcing CEQA's requirements for full disclosure — a hallmark of Justice Werdegar's tenure — is of great and lasting benefit to California.

★ ★ ★

These brief discussions of some of Justice Werdegar's CEQA opinions cannot do justice to them. These are landmark cases in every sense of the word, earning the admiration of California citizens and CEQA lawyers statewide. Statements of but a few are included here:

“Always nuanced and written with care, Justice Werdegar's environmental opinions have had — and will long have — sweeping relevance in environmental law.”

— Jim Arnone, global Chair of the Environment, Land & Resources Department at Latham & Watkins.

“Justice Werdegar's CEQA opinions provided the roadmap I followed in bringing the San Diego State University case to the Supreme Court and ultimately led to environmental protection for municipalities and communities alike.”

— Christine M. Leone, City of San Diego Deputy City Attorney.

“Just as U.S. Supreme Court Justice John Paul Stevens emerged as that Court's most influential environmental voice over the course of his thirty-five-year tenure on the High Court, California Supreme

Court Justice Kathryn Werdegar has been this state's most commanding environmental law presence over the past twenty-three years. Her numerous, authoritative opinions on CEQA, preemption and many other key environmental law issues will influence lower courts, environmental lawyers and California's environment far into the future."

— Richard Frank, UC Davis Professor of Environmental Practice.

"Our firm has greatly appreciated Justice Werdegar's careful, thoughtful opinions in the environmental arena, and particularly her mastery of the California Environmental Quality Act. She has made a true and lasting contribution to our understanding of that law."

— Rachel Hooper, partner, Shute, Mihaly and Weinberger.

"The towering impact Justice Werdegar will have on California environmental jurisprudence for decades to come would be hard to understate. The fundamental power and strength of her writing will inevitably stand the test of time. California is the better for having had Justice Werdegar on the Supreme Court."

— Doug Carstens, partner, Chatten-Brown & Carstens.

"Justice Werdegar has authored some of the most significant and oft-cited decisions addressing California environmental law, particularly with respect to CEQA. Her decisions address such basic issues as determining when CEQA applies and identifying the appropriate standard of judicial review. Her writing is clear and graceful. Justice Werdegar's decisions show that she has made a genuine effort to strike a delicate balance between agency discretion and protection of the environment. We will all continue to look to her work for many years."

— Jim Moose and Whit Manley, Remy Moose Manley.

Thank you, Justice Werdegar. We wish you many years of enjoyable walks and hikes in the beautiful state that you have played such a significant role in preserving.

JUSTICE WERDEGAR, STATE POLICE POWER AND OBSTACLE PREEMPTION:

An Enduring Legacy

SEAN B. HECHT*

Among former California Supreme Court Justice Kathryn Werdegar's important legacies is her body of opinions interpreting the scope of implied federal preemption of state laws. Justice Werdegar's opinions in this area reveal her understanding of the legitimate scope of state police-power protection of public health, consumer protection, and the environment in the face of federal preemption defenses to state law claims. In some cases, preemption of a particular state law is not clear on the face of the federal statute, but a defendant contends that Congress' objectives will be frustrated by the state law at issue and consequently seeks to apply "obstacle preemption" as a defense. In the opinions where she addressed obstacle preemption, Justice Werdegar viewed implied federal preemption in an appropriately bounded way. Her opinions acknowledge the room for state authority to apply expansively in these important areas, where state policy power is at its strongest, in the absence of a clear intent by Congress to forbid application of state law. Her cogent approach to preemption has ensured that California retains its proper authority to exercise police-power functions for the betterment of the state's residents.

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OBSTACLE PREEMPTION IN THE CALIFORNIA SUPREME COURT

The doctrine of obstacle preemption requires that state laws cannot coexist with federal laws “where the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹ Frequently, defendants faced with liability under state statutes will attempt to invoke obstacle preemption, claiming that liability available under the state law frustrates the will of Congress in enacting a federal statute in a related area of law. There are many areas where federal and state laws cover similar conduct or have overlapping jurisdiction, so over-application of this doctrine, especially in fields where state regulatory authority is traditionally robust, creates the potential for widespread invalidation of state statutes meant to regulate or prohibit conduct that the California Legislature believes to be potentially injurious to California residents.

In the final decade of her long career on the bench, Justice Werdegar authored several unanimous opinions addressing the scope of obstacle preemption in a range of contexts. Three of her opinions on obstacle preemption stand out as particularly noteworthy: *Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*;² *Quesada v. Herb Thyme Farms, Inc.*,³ and *People v. Rinehart*.⁴ These opinions demonstrate the justice’s consistent application of a judicial philosophy — consistent with longstanding precedent — that limits obstacle preemption to a narrow range of cases where application of state law truly frustrates Congress’ purpose. This approach retains states’ ability to protect health, safety, consumer rights, and the environment even where Congress has enacted laws on the same subject.

These opinions follow precedent in California, including a much-cited opinion authored by former Chief Justice Ronald George, that applies a similar philosophy.⁵ All these cases, in turn, follow clear federal precedent — now potentially at risk as the U.S. Supreme Court’s composition changes

¹ *Arizona v. United States*, 567 U.S. 387, 399–400 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

² 41 Cal.4th 929 (2007).

³ 62 Cal.4th 298 (2015).

⁴ 1 Cal.5th 652 (2016).

⁵ *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943 (2004), as modified (Oct. 13, 2004).

under President Donald Trump — applying a presumption against federal preemption of state laws. This presumption is particularly strong in obstacle preemption cases.⁶ And the cases are consistent with Ninth Circuit precedent, including the recent case *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*,⁷ in which a three-judge panel upheld very strict regulations on the production of foie gras in California against a preemption challenge.

Where Congress does not explicitly state that it is preempting state authority, courts find implied preemption in three situations. First, state law cannot coexist with federal law when it is clear that Congress intended, by comprehensive legislation, to occupy the entire field of regulation, leaving no room for the states to supplement federal law.⁸ Second, state law cannot stand when compliance with both federal and state regulations is an impossibility.⁹ And finally, when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” it must yield to federal law.¹⁰

JUSTICE WERDEGAR'S CONTRIBUTIONS TO OBSTACLE PREEMPTION JURISPRUDENCE

VIVA! INT'L VOICE FOR ANIMALS v. ADIDAS PROMOTIONAL RETAIL OPERATIONS, INC.: STATE AUTHORITY TO PROTECT WILDLIFE

Justice Werdegar made her first major contribution to the jurisprudence of obstacle preemption in *Viva! Int'l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*¹¹ In *Viva!*, the Court considered the application of a state law that prohibited products made from kangaroo from being imported into or sold within California.¹² The defendant asserted

⁶ See, e.g., *Quesada v. Herb Thyme Farms, Inc.*, 62 Cal.4th 298, at 314–15.

⁷ 729 F.3d 937 (9th Cir. 2013).

⁸ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947).

⁹ *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142–143, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

¹⁰ *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, at 428.

¹¹ 41 Cal.4th 929.

¹² CAL. PEN. CODE, § 6530.

that the state law thwarted federal policies, embodied in the application of the Endangered Species Act to kangaroos, that were intended to influence the management of kangaroo populations in Australia. The defendant thus urged a finding of preemption. The Court found that the state law was not an obstacle to any federal policy.

In the 1970s, the U.S. Fish and Wildlife Service listed various species of kangaroos as threatened species under the Endangered Species Act. As noted by the court:

Such a listing carries with it a prohibition on importation of the species, subject to exemptions or permits issued under the Act. (16 U.S.C. §§ 1538, 1539; 50 C.F.R. §§ 17.21(b), 17.31(a) (2007).) Fish and Wildlife thereafter formally banned commercial importation of the three species, as well as their body parts and products made from the bodies of the species. (45 Fed.Reg. 40959 (June 16, 1980); 60 Fed.Reg. 12888 (Mar. 9, 1995).) The ban was to remain in place until those Australian states commercially harvesting the three species “could assure the United States that they had effective management plans for the kangaroos, and that taking would not be detrimental to the survival of kangaroos.” (60 Fed.Reg. 12905 (Mar. 9, 1995); see 16 U.S.C. § 1533(d) [authorizing special species regulations]; 50 C.F.R. §§ 17.21(b), 17.31(a) (2007) [import restrictions apply absent special regulation].)¹³

Years later, the Fish and Wildlife Service delisted the species, meaning that federal law no longer prohibits their importation into the United States.¹⁴ The defendant argued that because, under the federal act, states may not “prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter,” federal policy will not allow a state to prohibit importation of non-endangered, or delisted, species into the United States. (§ 6(f).)

The Court disagreed. Justice Werdegar found:

In the end, Adidas’s preemption argument rests on the assertion that Penal Code section 653o is an obstacle to federal law because

¹³ *Viva! Int’l Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal.4th 929, at 947.

¹⁴ *Id.*

the current state of federal law allows kangaroo trade. Not so. The key here is the meaning of the word “authorized” in section 6(f). The trial court and Court of Appeal viewed a “failure to prohibit” as equivalent to “authorization.” But if that were so, there would be no room for state regulation, despite an evident federal intention that there be significant room for such regulation. Either an action would be prohibited by federal law, in which case state regulation would be superfluous, or it would not be prohibited by federal law, in which case state regulation would be preempted (in these courts’ views). The express language and legislative history of section 6(f) preclude this reading. Instead, every action falls within one of three possible federal categories. An action may be prohibited, it may be authorized, or it may be neither prohibited nor authorized. Within this last gray category of actions — a category that at present includes the import of products made from these three kangaroo species — section 6(f) grants states free room to regulate.¹⁵

In its analysis, the court relied on the police power interest in regulating wildlife management, citing numerous authorities. The court noted:

There is a presumption against federal preemption in those areas traditionally regulated by the states: “[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” ([citations omitted]; *Bronco Wine Co. v. Jolly*, 33 Cal.4th at p. 974 [in areas of traditional state regulation, a “strong presumption” against preemption applies and state law will not be displaced “unless it is clear and manifest that Congress intended to preempt state law”]; *Olszewski v. Scripps Health*, 30 Cal.4th at p. 815 [presumption against preemption ““provides assurance that the “federal-state balance” [citation] will not be disturbed unintentionally by Congress or unnecessarily by the courts’”]).¹⁶

The court found that despite the implication of foreign policy interests and federal application of the Endangered Species Act alongside traditional state police powers, there was no preemption. It summed up its conclusion

¹⁵ *Id.* at 952.

¹⁶ *Id.* at 938.

by noting that “Congress has expressly identified the scope of the state law it intends to preempt; hence, we infer Congress intended to preempt no more than that absent sound contrary evidence.”

The opinion demonstrates careful attention to legislative text in order to infer intent to preempt or not to preempt state law. Its impact is to confirm that state regulation to address a traditional police power area, wildlife protection, can exist alongside the flagship federal law on the same topic, where Congress did not clearly determine otherwise.

QUESADA v. HERB THYME FARMS, INC.:
STATE AUTHORITY TO PROTECT CONSUMERS
THROUGH REGULATING FOOD LABELING FRAUD

Justice Werdegar’s second significant foray into obstacle preemption analysis was in *Quesada v. Herb Thyme Farms, Inc.*¹⁷ In *Quesada*, the court considered whether a plaintiff could bring a cause of action for fraud or misrepresentation in a California state court alleging that a grower certified under the federal Organic Foods Production Act of 1990¹⁸ is intentionally mislabeling conventionally grown produce and selling it as organic. Thus, while in *Viva!* a state statute was claimed to be incapable of coexisting with a federal statute, the defendant in *Quesada* argued that certain state tort actions, otherwise available under state law, could not apply to specific conduct in light of the federal statutory scheme. Here, too, the court found in favor of state law’s ability to address the conduct at issue.

When Congress developed national organic standards, its intention was to provide uniform national standards for consumers. Congress was explicit about its purpose:

“It is the purpose of this chapter — [§] (1) to establish national standards governing the marketing of certain agricultural products as organically produced products; [§] (2) to assure consumers that organically produced products meet a consistent standard; and [§] (3) to facilitate interstate commerce in fresh and processed food that is organically produced.” (7 U.S.C. § 6501.) These three goals interrelate and mutually reinforce each other. A uniform national standard

¹⁷ 62 Cal.4th 298.

¹⁸ 7 U.S.C. §§ 6501–6522.

for marketing organic produce serves to boost consumer confidence that an “organic” label guarantees compliance with particular practices, and also deters intentional mislabeling, “so that consumers are sure to get what they pay for.” In turn, uniform standards “provide a level playing field” for organic growers, allowing them to effectively market their products across state lines by eliminating conflicting regulatory regimes. Standards that enhance consumer confidence in meaningful labels and reduce the distribution network’s reluctance to carry organic products may increase both supply and demand and thereby promote organic interstate commerce.¹⁹

Nonetheless, the law provided no private federal cause of action to enforce its provisions.

The court also considered the field of food labeling in order to assess the role of state regulation in the context of the federal law. It noted that this regulatory authority was an exercise of state police powers:

The regulation of food labeling to protect the public is quintessentially a matter of longstanding local concern. The first state legislation designed to address fraud and adulteration in food sales was enacted in 1785. California began regulating food mislabeling in the 1860s, just a few years after statehood. In response to widespread mislabeling, misbranding, and adulteration by food suppliers, by the late 18th century “many if not most states exercised their traditional police powers to regulate generally the marketing of impure or deceptively labeled foods and beverages.”²⁰

Ultimately, the court concluded that a state tort cause of action was very much in concert with Congress’ goals:

By all appearances, permitting state consumer fraud actions would advance, not impair, these goals. Substitution fraud, intentionally marketing products as organic that have been grown conventionally, undermines the assurances the USDA Organic label is intended to provide. Conversely, the prosecution of such fraud, whether

¹⁹ 62 Cal.4th 298, at 316 (citations omitted).

²⁰ *Id.* at 313 (citations omitted).

by public prosecutors where resources and state laws permit, or through civil suits by individuals or groups of consumers, can only serve to deter mislabeling and enhance consumer confidence. (See *Bates v. Dow Agrosiences LLC*, supra, 544 U.S. at p. 451, 125 S.Ct. 1788 [“Private [state] remedies that enforce federal misbranding requirements” can “aid, rather than hinder” the effectiveness of those labeling requirements].)²¹

In the end, the Court in *Quesada* decisively held that the state cause of action could readily coexist with or even aid in furthering the goals of the federal law, and was not an obstacle to Congress’ goals in enacting the statute. Justice Werdegar’s close attention to statutory text, in light of the especially strong presumption against implied preemption of core state police powers, led directly to this conclusion.

PEOPLE v. RINEHART: STATE AUTHORITY TO REGULATE MINING’S ENVIRONMENTAL IMPACTS

The capstone of Justice Werdegar’s obstacle preemption jurisprudence was her unanimous opinion in favor of the state’s moratorium on suction-dredge mining on federal lands in *People v. Rinehart*.²² This case raised the question whether a state may enact or enforce laws or regulations that have the effect of prohibiting particular methods of mining on federal lands. Justice Werdegar’s opinion confirmed that the federal Mining Law of 1872²³ can coexist with robust regulatory authority, for the purpose of environmental protection, over mining on federal public lands.

The narrow question in *Rinehart* was whether the California Legislature could lawfully enact a moratorium on suction-dredge mining in streambeds that included mining on federal lands. But the case necessarily confronts a broader issue: whether a range of state regulations on mining that apply to federal lands may be preempted by the Mining Law. Miners and property-rights advocates have long argued that states’ authority to restrict mining on federal lands is very limited. On the other hand, states such as California and Oregon have determined that in certain cases, mining

²¹ *Id.* at 316–17 (citations omitted).

²² 1 Cal.5th 652.

²³ R.S. §§ 2319 *et seq.* (codified at 30 U.S.C. §§ 22 *et seq.*).

will impair environmental quality or other resources to such an extent that sharply limiting or even prohibiting certain activities is warranted.

The General Mining Law of 1872 allows U.S. citizens to explore for, discover, and mine “valuable minerals” from most federal lands without paying the government for the minerals. (Today, the Mining Law applies to “hard rock” minerals such as metals, but does not apply either to fuel minerals, such as coal, oil and gas, or to “common varieties” including, for example, sand and gravel for use in construction.) The Mining Law facilitated rapid development of parts of the American West and some significant environmental cost.

Federal land management has evolved significantly since the 1870s. Statutes such as the Federal Land Policy and Management Act (FLPMA)²⁴ and the National Forest Management Act (NFMA)²⁵ require the government to balance multiple uses before committing to allow particular activities. At the same time, Congress has never amended the Mining Law. And the Mining Law’s general framework of allowing hard rock mining activities on federal lands can be in tension with both federal and state agencies’ ability to ensure that other values are upheld. The federal government can impose various requirements and restrictions on mining activity to ensure that there is no unnecessary or undue degradation of the land and its resources. These requirements generally include the need for approval of a Plan of Operations as well as adherence to federal regulations.²⁶ Nonetheless, federal agencies typically allow small-scale “recreational” mining to proceed without any federal permit or other discretionary approval.

At the same time, federal and state agencies and courts have consistently interpreted the Mining Law to allow state and local governments to regulate mining activity on federal lands. Specifically, where state environmental regulatory laws are not in conflict with federal laws, they may limit the activities on federal lands.²⁷ State laws often, for example, require

²⁴ 43 U.S.C. §§ 1701 *et seq.*

²⁵ 16 U.S.C. §§ 1600 *et seq.*

²⁶ *See, e.g.*, 36 C.F.R. Part 228, Subpart A (“set[ting] forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws . . . shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources”).

²⁷ *See California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987).

mitigation of the environmental impacts of mining activity, as well as reclamation (restoring the landscape after mining activities are completed). State regulation of mining activity existed before, and immediately after, the enactment of the Mining Law, and continues to this day.²⁸ California has many laws that regulate mining. For example, since 1961, the state has required anyone engaging in suction-dredge mining to obtain a permit and to comply with permit conditions.²⁹ By imposing a moratorium, the law at issue in this case went considerably further than the regulations that existed previously to govern suction-dredge mining.³⁰

According to the State of California's petition for review in *Rinehart*:

Suction dredge mining is a method for mining from the bed of a water body. This method typically uses a four- to eight-inch wide motorized vacuum, though sometimes a larger vacuum is used; the vacuum is inserted into the bottom of a stream and sucks gravel and other material to the surface, where it can be processed to separate any gold that might be present. Suction dredge mining is a way to recover gold that was placed in waterways by the Nineteenth Century's now-antiquated and highly destructive practice of hydraulic mining.³¹

Unfortunately, suction dredge mining can negatively affect stream and river ecosystems, because their operation creates disturbances in the water and the riverbed.³²

In 2006, a Native American tribe sued the state Department of Fish and Wildlife, claiming that the state's suction-dredge mining permit program was not environmentally protective enough and needed to undergo environmental review for potential revision. The case was resolved through a consent decree; the department promised to perform environmental review. The state Legislature enacted a moratorium on new permits in 2009,

²⁸ See *People v. Rinehart*, 1 Cal. 5th 652, at 667–70 (discussing early state regulation of mining activities in California).

²⁹ CAL. STATS. 1961, ch. 1816, § 1, p. 3864 (former FISH & G. CODE § 5653).

³⁰ CAL. STATS. 2009, ch. 62, § 1, adding Fish & G. Code (former § 5653.1).

³¹ *People v. Rinehart*, 1 Cal.5th 652, at 657.

³² CAL. STATS. 2009, ch. 62, § 2 (finding that “suction or vacuum dredge mining results in various adverse environmental impacts to protected fish species, the water quality of this state, and the health of the people of this state”).

until the completion of the environmental review.³³ The moratorium law has been since amended to eliminate the ending date, based on a legislative finding that such mining causes adverse impacts. And the Department of Fish and Wildlife enacted regulations that confirm the ban.³⁴ Suction-dredge mining nonetheless apparently remained a common practice, at least when the events underlying this case transpired.

The miner in this case, Brandon Rinehart, holds a mining claim within the Plumas National Forest in northern California. He was cited, and charged with two misdemeanors, for suction-dredge mining in a streambed in violation of state law. He claimed in his defense that the state law is preempted by federal law and thus invalid. He contended that by outlawing suction-dredge mining, the state is effectively prohibiting all profitable mining on his claim because suction-dredge mining is only mining method that would allow him to make a profit. He further contended that federal law requires that the state not eliminate his ability to make money from mining the claim.³⁵

The legal context for this case arises in part from a U.S. Supreme Court case, *California Coastal Commission v. Granite Rock Co.*³⁶ In that case, the Supreme Court rejected a facial challenge to a California Coastal Commission requirement that a miner obtain a state permit before mining on federal land. The Court in *Granite Rock* found that Congress did not intend to preempt state regulatory laws when it enacted the Mining Law. The Court assumed that NFMA and FLPMA would preempt state statutes determining the land use for a particular area of federal land; it held nonetheless that state laws that impose reasonable environmental regulations are not preempted by those federal laws, because Congress did not enact the Mining Law with the expectation that it would prevent state and local regulation of mining practices.³⁷

In the *Rinehart* case, the trial court sided with the state, finding that the state law is not preempted. Mr. Rinehart appealed, and the Court of

³³ CAL. STATS. 2009, ch. 62.

³⁴ See generally FISH & G. CODE, §§ 5653, 5653.1, 13172.5; information available at <https://www.wildlife.ca.gov/licensing/suction-dredge-permits>.

³⁵ *People v. Rinehart*, 1 Cal.5th 652, at 658–59.

³⁶ 480 U.S. 572 (1987).

³⁷ *Id.*

Appeal reversed the trial court decision, agreeing with the miners' argument that the state moratorium violated federal law that generally allows miners to obtain and maintain property rights in federal lands for the purpose of mining. The Court of Appeal held that if application of state law makes a mining claim "commercially impracticable," the Mining Law trumps state law and a state may not apply its law, because the Mining Law contemplates that miners be able to profitably work their claims.³⁸ In the Court of Appeal's view, the state was, in effect, making a land-use determination to ban all mining by preventing commercially impracticable mining, frustrating the intent of the Mining Law. (The Court of Appeal's order would have remanded the case to the trial court to determine whether the state in this case has, in fact, made mining commercially impracticable for Mr. Rinehart.)

The state successfully petitioned the California Supreme Court to hear its arguments why the Court of Appeal got it wrong.³⁹ The Supreme Court reversed the Court of Appeal, holding that the state law was not an obstacle to Congress' intended goals under the Mining Law. In an opinion by Justice Werdegar, the court held that "[t]he federal statutory scheme does not prevent states from restricting the use of particular mining techniques based on their assessment of the collateral consequences for other resources."⁴⁰

In her opinion, Justice Werdegar carefully analyzed the historical role of the Mining Law and cases decided by multiple courts since the enactment of that law. The opinion provides a deep and well-articulated analysis of the relationship between state police powers to protect health and safety and the federal Mining Law, concluding:

The federal laws Rinehart relies upon reflect a congressional intent to afford prospectors secure possession of, and in some instances title to, the places they mine. But while Congress sought to protect miners' real property interests, it did not go further and guarantee

³⁸ *People v. Rinehart*, 1 Cal.5th 652, at 659.

³⁹ Professors John Leshy (UC Hastings), Eric Biber (UC Berkeley), Alex Camacho (UC Irvine), and I filed an amicus curiae brief in support of the state's position (with assistance from two of Eric's students). The brief is available at http://legal-planet.org/wp-content/uploads/2016/08/S222620_ACB_Leshy.pdf.

⁴⁰ *People v. Rinehart*, 1 Cal.5th 652, at 670.

to them a right to mine immunized from exercises of the states' police powers.⁴¹

Justice Werdegar's opinion displays a nuanced command of the history of the application of the Mining Law and its complex relationship to complementary state laws (once again implementing traditional state police powers) over its long tenure; indeed, it includes a careful analysis and discussion of Congress' reaction to state regulation in the years following the enactment of the Mining Law, supporting the conclusion that the state moratorium at issue in *Rinehart* can coexist with the Mining Law. It also provides a clear and persuasive analysis of the function of the Mining Law, including the well-supported conclusion that "[t]he mining laws were neither a guarantee that mining would prove feasible nor a grant of immunity against local regulation, but simply an assurance that the ultimate original landowner, the United States, would not interfere by asserting its own property rights."⁴²

The opinion also provides some insight into how the leading U.S. Supreme Court case on federal preemption of state regulation of mining on federal lands, *California Coastal Comm'n v. Granite Rock Co.*,⁴³ should be applied. Notably, however, the court avoided some of the core questions left open by the Court in *Granite Rock*, by carefully framing the dispute as one over "obstacle preemption." The court noted that *Granite Rock* "for the first time clearly established the states' authority to regulate on environmental grounds mining claims within their borders,"⁴⁴ and the court also implicitly rejected Mr. Rinehart's claim, based on an interpretation of language from *Granite Rock*, that where such regulation "render[s] mining . . . commercially impracticable," it is preempted by federal law. Justice Werdegar's view that this state law was not an obstacle to the federal goal, while not binding in other states, is likely to be noted by government agencies and courts in other states, and thus to empower states to use their regulatory powers more broadly, where appropriate, to restrict mining activities that they find to be harmful to resources.⁴⁵

⁴¹ *Id.* at 657.

⁴² *Id.* at 666.

⁴³ 480 U.S. 572 (1987).

⁴⁴ *People v. Rinehart*, 1 Cal.5th 652, at 671.

⁴⁵ Editor's Note: *cert. denied*, 583 U.S. ____ (Jan. 8, 2018) (No. 16-970).

JUSTICE WERDEGAR'S LEGACY:
CAREFUL, SYSTEMATIC REVIEW OF IMPLIED
PREEMPTION DEFENSES WHERE THE STATE'S
CORE POLICE POWERS ARE AT ISSUE

Each of the three opinions discussed in this essay addresses obstacle preemption in a distinct context, and each bears on important questions of the balance of state and federal authority where state police powers are implicated. Taken together, the opinions affirm and extend prior California Supreme Court precedent, and develop the law consistent with U.S. Supreme Court and Ninth Circuit jurisprudence. First, the opinions apply a strong presumption that Congress did not intend to impliedly preempt state law. Second, they recognize the strength and primacy of regulation under general state police powers, in the absence of congressional intent to deprive a state of the authority to use those powers. Finally, they look carefully at federal statutory text and contextual clues to determine whether the specific state law at issue frustrates Congress' purpose and goals.

In a sense, Justice Werdegar's body of opinions applying obstacle preemption doctrine — solid as it is — is unremarkable. Her opinions straightforwardly and persuasively apply obstacle preemption doctrine to various specific legal controversies. But in another way, the opinions are significant: they present models of how to persuasively and systematically analyze an obstacle preemption defense with reference to a full range of sources, in contexts where the arguments in favor of and against application of state law require significant work to develop and analyze. Because obstacle preemption requires a deep attempt to understand Congress' goals and purposes, courts often need to bring nuanced and complex analysis to bear, drawing on multiple sources, to adequately address these claims. Moreover, Justice Werdegar's opinions are appropriately skeptical of inferences that Congress intended to preempt application of state laws implementing core police powers to protect health, safety, and the environment without clear evidence of intent to do so. Her opinions significantly advance this body of jurisprudence, and will surely stand the test of time.

WHAT HAPPENED TO HISPANIC NATURAL RESOURCES LAW IN CALIFORNIA?

PETER L. REICH*

INTRODUCTION

California has an elaborate statutory regime regulating the exploitation of natural resources, including water, minerals, land, and tidal areas, dating largely from the 1960s through the 1990s.¹ Yet this considerable body of legislation makes no mention of law originating under the Spanish and Mexican authorities governing the province in 1769–1821 and 1821–1848, respectively. Scholars of California history and geography have noted the relatively minimal environmental impact of pre-1848 European settlement, but have not asked whether the Hispanic tradition left any permanent footprints on legal development.² This gap is particularly evident compared to

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¹ See generally KENNETH MANASTER & DANIEL P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE (2017). See also CALIFORNIA ATTORNEY GENERAL'S ENVIRONMENTAL TASK FORCES, PRIMER ON PUBLIC ENVIRONMENTAL LAW IN CALIFORNIA (1971).

² John W. Caughey, *The Californian and His Environment*, in ESSAYS AND ASSAYS: CALIFORNIA HISTORY REAPPRAISED 3 (George Knoles ed., 1973) (few effects other than sea otter and beaver hunting by Russian and U.S. poachers); WILLIAM A. SELBY, REDISCOVERING THE GOLDEN STATE: CALIFORNIA GEOGRAPHY 49–50, 136, 189–190 (2d ed. 2006) (overgrazing in some areas but little mining or water depletion). See also GREEN

researchers' documentation of Spanish and Mexican influences on contemporary resource law in other parts of the Southwest.³

When the United States succeeded to Mexican sovereignty in 1848, California courts were confronted with water, mining, and land disputes, and so had to interpret the laws and customs under which conflicting claims arose. As will be seen, in these decisions many judges heavily cited legal sources from Spain and Mexico, which described a system especially well adapted to the geography of the region. The presence in and suitability of the Hispanic natural resources tradition in these cases raise the question of why its traces are not more apparent in the state today. Synthesizing my research in a series of articles and a recent book, this essay explores the reasons for the eventual superseding of Spanish and Mexican natural resources law by common law and modern statutes.⁴

WATER ALLOCATION

Legal historians of the Hispanic Southwest, which included California, have shown that water rights during the Spanish and Mexican periods were communal. Water was allotted among users, especially during times

VERSUS GOLD: SOURCES IN CALIFORNIA ENVIRONMENTAL HISTORY (Carolyn Merchant ed., 1998) (contrasting Native American and Hispanic limited resource use with intensive post-1848 economic development).

³ See Michael M. Brescia & Michael C. Meyer, *Natural Resources and the Law in Hispanic Arizona: The Babocómari Ranch and the Living Legacies of the Gadsden Purchase*, 58 J. SW. 29 (2016) (Arizona land and irrigation rights); Michael C. Meyer & Michael M. Brescia, *The Treaty of Guadalupe Hidalgo as a Living Document: Water and Land Use Issues in Northern New Mexico*, 73 N.M. HIST. REV. 321 (1998) (New Mexico grazing, wood-cutting, and water rights); CHARLES R. PORTER, JR., *SPANISH WATER, ANGLO WATER: EARLY DEVELOPMENT IN SAN ANTONIO* (2009) (Texas water allocation); Peter L. Reich, *Litigating Property Under the Guadalupe Hidalgo Treaty: The Sangre de Cristo Land Grant Case*, 5 SCHOLAR 217 (2003) (Colorado grazing, wood-cutting, and water access).

⁴ For more detailed exposition of the topics discussed *infra*, see Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 WASH. L. REV. 869 (1994); Peter L. Reich, *Western Courts and the Privatization of Hispanic Mineral Rights Since 1850: An Alchemy of Title*, 23 COLUM. J. ENVTL. L. 57 (1998); Peter L. Reich, *Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850*, 45 AM. J. LEGAL HIST. 353 (2001); PETER L. REICH, *THE LAW OF THE UNITED STATES–MEXICO BORDER: A CASEBOOK* 313–350 (2017).

of drought in this chronically arid region.⁵ Such rights were not absolute or exclusive as under Anglo-American common law, but were regularly apportioned by provincial and territorial governors between *pueblos* (towns) and other consumers like missions and individual farmers.⁶ When the 1848 Treaty of Guadalupe Hidalgo transferred sovereignty over most of the Southwest to the United States, the treaty's provision that preserved existing property rights often resulted in the pueblos' successor cities vying for water supplies against landowners.⁷

In the 1870s this conflict came to a head over the Los Angeles River. Upstream landowners in the San Fernando Valley diverted water from the river, threatening the growth of Los Angeles and the revenue it enjoyed from selling surplus water to other users.⁸ Initially, the California courts refused to grant the city an absolute right to the river, in accordance with Hispanic law's fair allocation principle.⁹ But in 1895 the California Supreme Court held that Los Angeles could monopolize its local water source based on a so-called "pueblo water right" supposedly originating in the Spanish period, though this theory is contradicted by the ample evidence of communal sharing presented in opposition to the city.¹⁰

In subsequent years the courts extended Los Angeles' right to water to supply its newly annexed areas, the river's subterranean flow, the entire aquifer underlying the San Fernando Valley, reclaimed floodwater, and

⁵ NORRIS C. HUNDLEY, *THE GREAT THIRST: CALIFORNIANS AND WATER — A HISTORY* 38–60 (rev'd ed. 2001); MICHAEL C. MEYER, *WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY, 1550–1850* 157 (1984).

⁶ For a specific example of this type of accommodation, see HUNDLEY, *supra* note 5, at 51–58 (water dispute resolved between Los Angeles and San Fernando mission).

⁷ Treaty of Guadalupe Hidalgo, Article VIII, 1848, 9 Stat. 922, 929–930. See Federico M. Cheever, Comment, *A New Approach to Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe Hidalgo*, 33 UCLA L. REV. 1364 (1986) (discussing the scope of the treaty).

⁸ HUNDLEY, *supra* note 5, at 127.

⁹ *City of Los Angeles v. Baldwin*, 53 Cal. 469 (1879); *Feliz v. City of Los Angeles*, 58 Cal. 73 (1881); *Elms v. City of Los Angeles*, 58 Cal. 80 (1881).

¹⁰ *Vernon Irrigation Co. v. City of Los Angeles*, 39 P. 762 (Cal. 1895). See also Reich, *Mission Revival Jurisprudence*, *supra* note 4, at 891–894 (detailing voluminous data on Hispanic custom and law, including testimonial proof that the pueblo never monopolized all the river's water, revealed in the manuscript *Vernon* case file).

surplus water from the Owens River.¹¹ The putative pueblo water right was also applied to give San Diego exclusive control over the San Diego River, and has been upheld regarding Los Angeles as recently as 1975, despite the contradictory evidence still before the court.¹² Texas and New Mexico state courts' explicit rejection of any purported pueblo water right vividly contrasts with California's refusal to follow the communal Hispanic water law tradition, so well adapted to a desert environment.¹³

MINERAL EXTRACTION

As with water, mining under the Hispanic legal regime differed markedly from the common law's individual property rights approach. Spanish and Mexican tradition held that the sovereign owned precious minerals and had the prerogative to distribute concessions through an elaborate process of discovery, official registration, and monitoring.¹⁴ This centralized control and system of allocation accorded with the communal Hispanic policy of exercising governmental power over natural resources for the common good.¹⁵

Paralleling the trajectory of water law development, U.S. courts in California initially followed Mexican law, holding that the state, as successor to the prior polity, owned all precious minerals despite some landowners' assertion that their surface property included an underground estate as well.¹⁶ The California Supreme Court upheld this precedent in 1858 in

¹¹ *City of Los Angeles v. Pomeroy*, 57 P. 585 (Cal. 1899); *City of Los Angeles v. City of Glendale, Same v. City of Burbank*, 142 P.2d 289 (Cal. 1943).

¹² *City of San Diego v. Cuyamaca Water Co.*, 287 P. 475 (Cal. 1930); *City of Los Angeles v. San Fernando*, 537 P.2d 1250 (Cal. 1975).

¹³ *In re Contests of City of Laredo*, 675 S.W.2d 257 (Tex. Ct. App. 1984); *State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47 (N.M. 2004). *See also* DANIEL TYLER, *THE MYTHICAL PUEBLO RIGHTS DOCTRINE* (1990) (elaborating on the concept's ahistorical nature).

¹⁴ REALES ORDENANZAS PARA LA DIRECCIÓN, RÉGIMEN Y GOBIERNO DEL IMPORTANTE CUERPO DE LA MINERÍA DE NUEVA ESPAÑA (1783); MARVIN D. BERNSTEIN, *THE MEXICAN MINING INDUSTRY* 11 (1964).

¹⁵ *See* LANE SIMONIAN, *DEFENDING THE LAND OF THE JAGUAR: A HISTORY OF CONSERVATION IN MEXICO* 62 (1995).

¹⁶ *Hicks v. Bell*, 3 Cal. 219 (1853); *Stoakes v. Barrett*, 5 Cal. 37 (1855); *McClintock v. Bryden*, 5 Cal. 97 (1855).



MARIPOSA COUNTY COURTHOUSE — OLDEST COURTHOUSE IN CALIFORNIA, BUILT IN 1854; SITE OF THE 1857 TRIAL OF JOHN C. FRÉMONT'S CLAIM OF MINERAL RIGHTS IN HIS RANCHO LAS MARIPOSAS LAND GRANT PURCHASE (CONSTRUCTED ON LAND DONATED TO THE COUNTY BY FRÉMONT IN LIEU OF TAXES).

complex litigation between individual prospectors and explorer John C. Frémont, who claimed exclusive dominion over gold-bearing quartz on his land in the Sierra Nevada foothills.¹⁷

But a year later, two justices from the prior three-judge panel had been replaced, and the court reversed itself to side with Frémont concerning surface owners' subterranean rights. Disregarding the Merced Mining Company's extensive briefing on Hispanic mineral law, Chief Justice Stephen Field wrote for the majority that the state of California's regulatory power had not been exercised over minerals underneath private property.¹⁸ Going further in an 1861 decision, Field held explicitly that surface proprietors owned the precious metals underneath their land.¹⁹ He based his theory of

¹⁷ *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279, 311–314 (1859).

¹⁸ *Id.* at 373–376.

¹⁹ *Moore v. Smaw and Frémont v. Flower*, 17 Cal. 199 (1861).

mineral privatization on the unsupported argument that the U.S. Congress, in establishing a confirmation process for land claims under the Guadalupe Hidalgo treaty (the 1851 California Land Act), impliedly conveyed both the surface and subsurface when it validated a grant.²⁰ These decisions constituted a clear rejection of Mexico's resource tradition, despite the lack of any evidence that either the treaty drafters or Congress ever meant to do so in settling land titles.²¹

Surface mineral proprietorship is still the rule in California, having been affirmed by a 1955 federal district court applying state law. Remarkably, the judge admitted that Hispanic law indicated otherwise, but considered that Field's version of the claim-resolution process should be paramount.²² Courts in New Mexico and Arizona, and legislators in Texas have all accepted California's privatization approach.²³ As a result of these decisions in California and other frontier regions, simple placer mining by individuals gave way to increasingly elaborate, expensive, and ecologically harmful extractive techniques, like the stamp mills used by Frémont and hydraulic mining.²⁴ It should be noted that Mexico's own late-nineteenth-century departure from the Hispanic tradition of close government supervision over mining, in favor of more intensive private exploitation, resulted in similar environmental destruction.²⁵

LAND USE PATTERNS

As with water and minerals, land use in Hispanic California followed a model of government control and distribution. The Spanish Crown promulgated the Laws of the Indies in 1513 and 1523 for the orderly settlement

²⁰ *Id.* at 124–125.

²¹ See Reich, *An Alchemy of Title*, *supra* note 4, at 71–78 (illuminating the extensive discussions of Hispanic mineral law in the *Biddle Boggs* and *Moore* appellate briefs).

²² *Blue v. McKay*, 136 F. Supp. 315 (D.D.C. 1955), *aff'd*, 232 F.2d 688 (D.C. Cir.), *cert. denied*, 352 U.S. 846 (1956).

²³ *Catron v. Laughlin*, 72 P. 26 (N.M. 1903); *Gallagher v. Boquillas Land & Cattle Co.*, 238 P. 395 (Ariz. 1925); TEX. CONST. of 1866, art. VII, § 39.

²⁴ DUANE A. SMITH, *MINING AMERICA: THE INDUSTRY AND THE ENVIRONMENT* 48 (1987); RODMAN W. PAUL, *MINING FRONTIERS OF THE FAR WEST: 1848–1880* 30–33 (1963).

²⁵ See BERNSTEIN, *supra* note 14, at 18–19, 27–29; SIMONIAN, *supra* note 15, at 54–55, 63, 245n.76.

of the New World. They specified that towns had to include a sufficient number of *solares* (residential lots) at the center, around which would be placed *ejidos* (commons) for various public uses, while beyond them would lie *dehesas y tierras de pasto* (grazing areas) and *propios* (municipal grounds) which could be leased to generate revenue.²⁶ Such communal uses were an inheritance from Spain, where strict limitations on grazing and selling land protected communities from resource exhaustion and thus avoided the “tragedy of the commons.”²⁷ *Propios* were never intended to be sold, and officials or individual citizens could sue municipal councils for alienating these lands.²⁸ In Mexican California, *ayuntamientos* (town councils) could only rent rather than sell pueblo land to individuals, and improvement requirements were imposed on lot owners.²⁹ As might be expected, when American political control was installed in 1846, land speculators and settlers pressured the new authorities to privatize the communal aspects of the Hispanic land system.

In a series of cases beginning in the 1850s, the California Supreme Court oscillated on the question of whether municipalities could sell public land to private purchasers. Initially, the court held that San Francisco’s U.S. *alcalde* (mayor), having the same power as his Mexican predecessor, could not alienate the city’s pueblo lands, and cited Hispanic legal treatises in support.³⁰ But several years later Justice Solomon Heydenfeldt wrote for the court in overruling these decisions, asserting without any basis that Mexican authorities had been allowed to sell municipal property.³¹ Yet by the end of the decade the court had reversed itself again, relying on Hispanic sources to find that pueblo lands had been held “in trust for

²⁶ *Fundación de Pueblos en el Siglo XVI*, 6 BOLETÍN DEL ARCHIVO GENERAL DE LA NACIÓN 321, 343–344, 346–347 (1935).

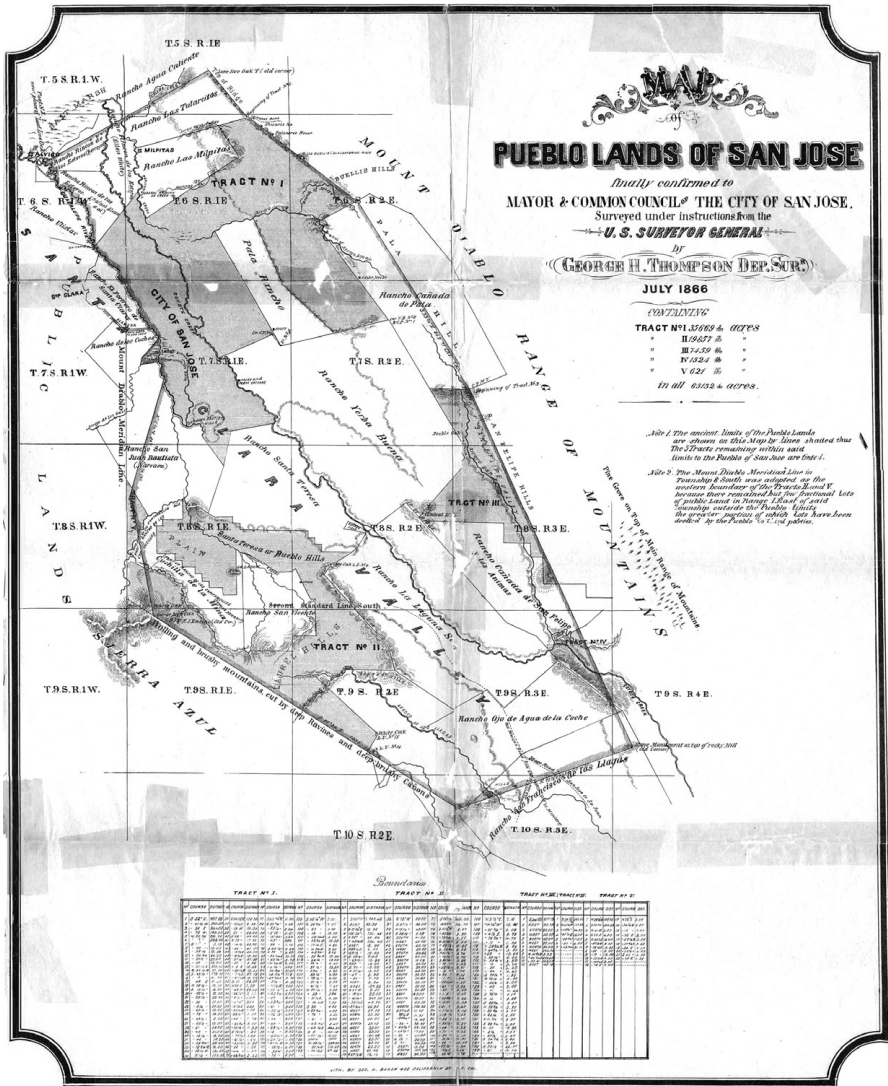
²⁷ See DAVID E. VASSBERG, *LAND AND SOCIETY IN GOLDEN AGE CASTILE* 21, 35–36 (1984).

²⁸ *Id.* at 24–25.

²⁹ José Figueroa, *Plan de propios y arbitrios . . .* August 8, 1834, Archives of California, State Papers, Missions and Colonization, v. II (original in Bancroft Library, UC Berkeley); Miroslava Chávez, *Women and the American Conquest in Los Angeles: From the Mexican Era to American Ascendancy* 22, 81–82 (Ph.D. dissertation, UCLA, 1998).

³⁰ *Ladd v. Stevenson and Parker*, 1 Cal. 18 (1850); *Woodworth v. Fulton*, 1 Cal. 295 (1850).

³¹ *Cohas v. Raisin*, 3 Cal. 443 (1853).



**PUEBLO LANDS OF SAN JOSÉ — 1866 U.S. GOVERNMENT
 MAP OF PUEBLO LANDS (IN GRAY) BELONGING TO THE
 PUEBLO OF SAN JOSÉ AND SOLD AFTER INCORPORATION BY
 THE CITY OF SAN JOSÉ TO PAY MUNICIPAL DEBTS
 (SEE FOOTNOTE 33 ON FACING PAGE).**

Published in FREDERIC HALL, THE HISTORY OF SAN JOSE AND SURROUNDINGS (1871).

the public use,” and so could not be sold at auction to satisfy city debts.³² In the 1860s and 1870s the court maintained this position, holding that these lands could not be mortgaged and that the public use dedication was permanent.³³

The California Supreme Court ultimately disregarded Hispanic law and returned to the privatization perspective, ruling in 1903 that Monterey could lawfully sell its pueblo lands to speculators.³⁴ Lower state courts likewise permitted the cities of Los Angeles and San Diego to alienate many acres of public property, markedly ignoring the historical limitation on municipal power.³⁵ The upshot of California cities’ sale of their pueblo lands was that large portions of the urban commons were eliminated. Even when cities retained parks or other public areas, they often located them asymmetrically in places inaccessible to the majority of residents — a policy exemplified by San Francisco’s Golden Gate Park and Griffith Park in Los Angeles.³⁶ This departure from the Spanish and Mexican tradition of reserving centrally located land for the public benefit constituted an opportunity lost for maintaining open space and keeping cities livable.³⁷

TIDELANDS ACCESS

A final topic wherein California courts have considered the impact of Hispanic law concerns public ownership of and access to tidelands. Under Roman law, “the sea-shore” up to the highest winter tide was common

³² *Hart v. Burnett*, 15 Cal. 530 (1860).

³³ *Branham v. Mayor and Common Council of San José*, 24 Cal. 585 (1864); *San Francisco v. Canavan*, 42 Cal. 541 (1872). See also Peter L. Reich, *Introduction to FREDERIC HALL, THE LAWS OF MEXICO: A COMPILATION AND TREATISE RELATING TO REAL PROPERTY, MINES, WATER RIGHTS, PERSONAL RIGHTS, CONTRACTS, AND INHERITANCES* (reprint 2016) (1885) (noting that *Branham* attorney was noted expert in Mexican law).

³⁴ *Monterey v. Jacks*, 73 P. 436 (1903).

³⁵ *Dunlop v. O’Donnell*, 6 Cal. App. 2d 1 (1935); *DeYoung v. City of San Diego*, 194 Cal. Rptr. 722 (1983).

³⁶ See MARY P. RYAN, *CIVIC WARS* 205–209 (1997); Mary Katherine Gibson, *The Changing Conception of the Urban Park in America: The City of Los Angeles as a Case Study* 32 (M.A. thesis, UCLA, 1977).

³⁷ See Reich, *Dismantling the Pueblo*, *supra* note 4 (discussing municipal land alienation validated by courts that knowingly overrode the Hispanic legal model).



§ 1466. *What Are the Things a Man may Do upon the Sea-shore.*—Every man who chooses may build a house or cabin upon the sea-shore as a retreat, and he may erect there any other edifice whatever to serve his purposes; provided he does not thereby interfere with the use of the shore, which every one has a right in common to enjoy. He may also build galleys there, or any other vessel whatever; or stretch and mend his nets; and when he is there, or employed for these or other purposes of a similar nature, no one has a right to disturb him. And by the sea-shore is understood all that space of ground covered by the waters of the sea in their highest annual swells, whether in winter or summer.

SIETE PARTIDAS — COVER PAGE OF SPAIN'S MEDIEVAL LAW CODE (1565 EDITION) AND TRANSLATION BY FREDERIC HALL OF SECTION ON TIDELANDS ACCESS (SEE FOOTNOTE 39 ON FACING PAGE).

property, which could be used by all for fishing, shelter, and beaching boats.³⁸ Spain's medieval law code, the *Siete Partidas*, expressed this concept as royal sovereignty over the "highest swells of the sea."³⁹ Incorporating this principle, Spanish and Mexican land grants in California were bounded by the high tide line, although disputes emerged during the U.S. confirmation process regarding how far some parcels extended into navigable waters.⁴⁰ Scholars have noted this Hispanic legal antecedent to the modern public trust doctrine, which authorizes government regulatory power over waterways.⁴¹ Yet almost all California cases upholding government jurisdiction to manage access to tidelands have failed to cite Spanish or Mexican law in support.⁴²

In a striking exception to this trend, the California Supreme Court upheld Los Angeles' title to Ballona Lagoon, an arm of the Pacific Ocean subject to tidal influence and claimed by adjacent landowners under an 1839 grant from Mexico.⁴³ The city wished to dredge the lagoon, construct sea walls, and make other improvements without condemning any property by eminent domain. Writing for the majority, Justice Stanley Mosk

³⁸ J. INST. 2.1.1.; 2.1.3.; 2.1.5.

³⁹ FREDERIC HALL, *THE LAWS OF MEXICO: A COMPILATION AND TREATISE RELATING TO REAL PROPERTY, MINES, WATER RIGHTS, PERSONAL RIGHTS, CONTRACTS, AND INHERITANCES* § 1466 (reprint 2016) (1885) (translating Partida 3, Título 28). See also *Humble Oil & Refining Co., et al. v. Sun Oil Co., et al.*, 191 F.2d 705, 720 (5th Cir. 1951) (citing *id.*).

⁴⁰ ERNEST R. BARTLEY, *THE TIDELANDS OIL CONTROVERSY* 61n.8 (1953). See, e.g., *SISTER MARY STE. THÉRÈSE WITTENBURG, THE MACHADOS AND RANCHO BALLONA* 35 (1973) (arguments before the Land Commission whether a rancho's boundary reached the sea or ended at an inner, enclosed bay resolved in favor of the latter).

⁴¹ Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217, 225, 240 (1984); MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789–1920* 219–225 (1987).

⁴² See, e.g., *Boone v. Kingsbury*, 273 P. 797 (Cal. 1928) (authorizing the "useful purpose" of oil drilling); *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (filling of a bay restricted to protect ecology and recreation); *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (limiting municipal water rights when their exercise would eradicate natural habitat). Cf. *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921) (construing federal tidelands reservation narrowly to block condemnation of island that was part of Mexican grant as confirmed).

⁴³ *City of Los Angeles v. Venice Peninsula Properties*, 644 P.2d 792 (Cal. 1982).



BALLONA WETLANDS — ARTISTIC DEPICTION OF “WIYOT’S CHILDREN” AT THE EARLY TONGVA/GABRIELEÑO NATIVE-AMERICAN VILLAGE OF SA-ANGNA IN PRESENT-DAY PLAYA DEL REY

(detail of painting by Mary Leighton Thomson, available at <http://www.ballonafriends.org/history.html>).

ruled that the lagoon was subject to the public trust in tidelands, that the title of plaintiffs’ predecessors was limited by the trust according to Mexican law, and that by the Treaty of Guadalupe Hidalgo the U.S. government, the state, and the city succeeded to ownership of the public’s rights.⁴⁴ However, this recognition of the Hispanic basis for the public trust proved ephemeral, for the U.S. Supreme Court reversed the decision on the procedural ground of the state’s failure to assert its interest during the land grant confirmation proceedings.⁴⁵

⁴⁴ *Id.*

⁴⁵ *Summa Corp. v. California ex rel. State Lands Commission et al.*, 466 U.S. 198 (1984). See REICH, *THE LAW OF THE UNITED STATES–MEXICO BORDER*, *supra* note 4 (detailing U.S. courts’ use of Mexican law regarding the public trust and other doctrines). See also Cheever, *A New Approach*, *supra* note 7 (discussing the land grant–public trust relationship).

CONCLUSION

For a variety of reasons Hispanic natural resources law has not retained much of a presence in contemporary California jurisprudence. Many post-annexation judges considered Spanish and Mexican principles, but the overall trend was to reject these in favor of common law. In the words of legal historian Morton Horwitz, the mid-nineteenth-century perspective was one in which “[d]ominion over land began to be regarded as an absolute right to engage in any conduct on one’s property regardless of its economic value.”⁴⁶ In line with this historical process, the prior anti-developmental tradition was either distorted (as in the “pueblo water right”), overridden (as with minerals and land claims), or procedurally blocked (as with tidelands access). These decisions facilitated a degradation of resources that has been only partially reversed by California’s modern environmental regime.

After an intervening century of intensive exploitation, sustainability policies now echo much of the Hispanic legal approach to water, minerals, land, and coastal areas. But such enlightened regulation still exists uneasily with suburbanized planning. The contrast between fire management rules in Mexican Baja California and those in U.S. Southern California offers a clear example of how reclaiming parts of the traditional model can contribute to resource conservation and public safety. In Mexican Baja, restricting construction in wildlands while allowing periodic natural fires there limits fuel build-up, so that frequent but low-intensity burns affect few people or properties. But north of the border, private residential housing sprawling into increasingly remote areas is protected by fire suppression policies that allow chaparral to proliferate and thus feed far more destructive conflagrations.⁴⁷ The implication of this difference is that exerting greater control over where individuals

⁴⁶ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 102 (1977).

⁴⁷ RICHARD A. MINNICH & ERNESTO FRANCO VIZCAÍNO, *LAND OF CHAMISE AND PINES: HISTORICAL ACCOUNTS AND CURRENT STATUS OF NORTHERN BAJA CALIFORNIA’S VEGETATION* 136–138 (1998). See also Molly Hunter, *Wildland Fire Use in Southwestern Forests: An Underutilized Management Option?*, 47 NAT. RES. J. 257 (2007) (noting the ecological benefits to U.S. forests where the Mexican model is followed and resource managers do not suppress fires).

may live will save lives as well as landscapes. We cannot return wholesale to the communal natural resources laws of California's past, but we can implement aspects of that approach which have proved effective in this geographical setting.

★ ★ ★

FROM CORPORATISM TO CITIZEN OVERSIGHT:

The Legal Fight over California Redwoods, 1969–1999

DARREN F. SPEECE*

INTRODUCTION¹

In 1986, Charles Hurwitz was known in Northern California only as the shadowy Texas Wall Street tycoon who had suddenly and forcibly purchased a titan of the North Coast timber industry. Hurwitz would do little to improve his image on the North Coast, and his company suffered as a result, deepening the already intense Redwood Wars as he waged war against local activists over the fate of the forest he had purchased. The first time Charles Hurwitz, CEO of Maxxam Group Holding, Inc., addressed his new employees at The Pacific Lumber Company, he replied to a question about his intentions by telling the crowd, “There’s a little story about the golden rule. Those who have

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¹ An earlier version of this article was first published as Darren F. Speece, “From Corporatism to Citizen Oversight: The Legal Fights over the California Redwoods, 1970–1996,” *Environmental History* 14, No. 4 (October 2009): 705–736. Portions of this article are also utilized in Darren F. Speece, *Defending Giants: The Redwood Wars and the Transformation of American Environmental Politics* (Seattle: University of Washington Press, 2017).

the gold, rule.”² That twist of the biblical Golden Rule about treating others as you’d like to be treated became shorthand for the popular press’ overly simplistic morality story about a conflict between Wall Street and local environmentalists over the fate of Headwaters Forest. The forest was located approximately 250 miles north of San Francisco, and at the time it was the world’s last privately owned and unprotected old-growth redwood forest complex, containing half-a-dozen groves of giant redwoods nearly 300 feet tall, 20 feet in diameter, and nearly 2,000 years old. After Hurwitz acquired Pacific Lumber, North Coast activists identified a 60,000-acre forest threatened by the company’s new logging regime. Pacific Lumber and activists fought for 20 years over how that forest should be managed. They fought in the media, in legislative halls, in the forests, and especially in the courtroom. Litigation developed into the activists’ most powerful tool, and the state courts of California were the most frequent venue for the battles among timber companies, activists, and government agencies. The battles transformed California’s and the nation’s forestry regulations on private land, and demonstrated the power granted to citizen activists by the environmental protection regime erected during the 1970s.

Hurwitz’s quotation did epitomize the history of California forestry regulation to that point. Until 1970, state law *had* granted the timber industry authority to self-regulate. After 1970, however, citizens successfully leveraged the courts to challenge the state’s forestry regime, with its traditional focus on timber production. Thus, by the time Hurwitz orchestrated the takeover of The Pacific Lumber Company and uttered his infamous phrase in 1986, the California Board of Forestry — although still heavily influenced by the needs of the timber industry — had endured nearly two decades of legal assault on the state’s long-standing production-focused logging practices and institutions.³

² The quote can be found in numerous articles, including Ellen Schultz, “A Raider’s Ruckus in the Redwoods,” *Fortune*, April 24, 1989, 72, and John Skow, “Redwoods: The Last Stand,” *Time*, June 24, 2001, <http://www.time.com/time/magazine/article/0,9171,1101940606-164513,00.html>. The best description of the incident at Scotia is by David Harris, *The Last Stand: The War Between Wall Street and Main Street over California’s Ancient Redwoods* (New York: Times Books, 1995).

³ Because of this corporatist system, no “iron triangle” existed to govern private timber operations on private land in California. The industry was left to its own devices, and the board helped coordinate fire and pest protection, as well as reforestation efforts.



THE MISTY ENVIRONS OF HEADWATERS FOREST.

Photo by the author. All rights reserved.

A close study of the history of citizens' legal campaigns against California's forestry regulations challenges some of the key literature about postwar environmental politics by shifting the focus of study from the national perspective to the local perspective. The typical narrative of postwar environmental politics, as constructed by Stephen Fox, Samuel Hays, Robert Gottlieb, Michael Kraft, Richard Lazarus, and others, has, until recently, emphasized the nationalization and professionalization of

After 1970, because the Board of Forestry was retained, an iron triangle of the Board, the courts, and interest groups regulated timber operations on private land. This is a very different situation than the regulation of the national forests where Congress, the courts, the Forest Service, and interest groups shaped forest service policy on public lands after 1970. See Paul Hirt, *A Conspiracy of Optimism: Management of the National Forests since World War Two* (Lincoln: University of Nebraska Press, 1994) and Dennis C. Le Master, *Decade of Change: The Remaking of Forest Service Statutory Authority during the 1970s* (Westport, Conn.: Greenwood Press, 1984) for analyses of the changes in national forest governance and management.

“modern” environmentalism and the development of command-and-control federal environmental regulation. At its core, the narrative explains how the expanded, largely white middle-class environmental movement — animated by its understanding of popular ecology and of the destructive forces of modern industry — rose up and demanded a cleaner, more beautiful environment filled with greater recreation opportunities. Earth Day 1970 represents the culmination of that popular upsurge, and from there, professional “environmentalists,” politicians, and bureaucrats took the reins and built the modern environmental protection regime. Environmental politics was then integrated into the everyday horse-trading of Capitol Hill. There, D.C.-based environmental groups, business interests, and state actors lobbied and debated the scope and intent of the new environmental laws, and the courts rendered judgments.⁴

The top-down narrative of nationalization and professionalization frays when viewed from a local perspective, however. Many scholars have addressed local activism and its effects on the federal environmental

⁴ On the rise of modern environmentalism, see especially Samuel P. Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955–1985* (Cambridge: Cambridge University Press, 1987) and *A History of Environmental Politics since 1945* (Pittsburgh: University of Pittsburgh Press, 2000); Roderick Nash, *Wilderness and the American Mind* (New Haven: Yale University Press, 1973); Richard J. Lazarus, *The Making of Environmental Policy* (Chicago: University of Chicago Press, 2004); and Adam Rome, *The Bulldozer in the Countryside: Suburban Sprawl and the Rise of American Environmentalism* (Cambridge: Cambridge University Press, 2001). On the nationalization and professionalization of modern environmental politics and the environmental movement, see Thomas R. Dunlap, *Faith in Nature: Environmentalism as Religious Quest* (Seattle: University of Washington Press, 2004), who argued that professional national groups tried to impose their ideologies on local people; J. Brooks Flippen, *Nixon and the Environment* (Albuquerque: University of New Mexico Press, 2000); Stephen Fox, *The American Conservation Movement: John Muir and His Legacy* (Madison: University of Wisconsin Press, 1985), whose argument, to be fair, revolved more around the role of the “radical amateur” in the environmental movement, despite the professionalization of the movement; Robert Gottlieb, *Forcing the Spring: The Transformation of the American Environmental Movement* (Washington, D.C.: Island Press, 1993); Michael E. Kraft, *Environmental Policy and Politics* (New York: Pearson Longman, 2007); James Salzman and Barton H. Thompson, *Environmental Law and Policy* (New York: Foundation Press, 2003); Joseph L. Sax, *Mountains Without Handrails: Reflections on the National Parks* (Ann Arbor: University of Michigan Press, 1980); and James Morton Turner, “The Promise of Wilderness: A History of American Environmental Politics, 1964–1994” (PhD diss., Princeton University, June 2004).

protection regime and public land management, but there are relatively few treatments of the local politics of forestry on private land. The federal studies illuminated the dramatic postwar changes in federal policy for public land management, the rifts and tensions between local and national environmental groups during the spotted owl conflict, and the ways local groups affected the implementation of the Wilderness Act and the National Environmental Policy Act. Studying the Redwood Wars demonstrates how local activists on the North Coast of California developed a litigation campaign to discredit and destroy the Progressive-Era corporatist system in order to better consider non-commercial forest resources in the regulation of private timber land.⁵

⁵ Hirt, *Conspiracy of Optimism* and Le Master, *Decade of Change* are great studies of the transformation of federal land management. Some of the recent treatments of local forestry activism as it related to federal laws such as the Wilderness Act of 1964, the Endangered Species Act, and the National Forest Management Act include William Dietrich, *The Final Forest: The Battle for the Last Great Trees of the Pacific Northwest* (New York: Penguin Books, 1993); Kathie Durbin, *Tree Huggers: Victory, Defeat & Renewal in the Northwest Ancient Forest Campaign* (Seattle: The Mountaineers, 1996); Kevin R. Marsh, *Drawing Lines in the Forest: Creating Wilderness Areas in the Pacific Northwest* (Seattle: University of Washington Press, 2007); and Samuel P. Hays, *Wars in the Woods: The Rise of Ecological Forestry in America* (Pittsburgh: University of Pittsburgh Press, 2007). Henry F. Bedford produced a wonderful study of the local activism in New Hampshire regarding the NEPA impacts on the nuclear industry, *Seabrook Station: Citizen Politics and Nuclear Power* (Amherst: University of Massachusetts Press, 1990). The literature on the Redwood Wars is largely journalistic and autobiographical, including Judi Bari, *Timber Wars* (Monroe, Me.: Common Courage Press, 1994); Joan Dunning, *From the Redwood Forest: Ancient Trees and the Bottom Line: A Headwaters Journey* (White River Junction, Vt.: Chelsea Green Publishing, 1998); Dave Foreman, *Confessions of an Eco-Warrior* (New York: Harmony Books, 1991); and Julia Butterfly Hill, *The Legacy of Luna: The Story of a Tree, a Woman, and the Struggle to Save the Redwoods* (San Francisco: HarperSanFrancisco, 2000). Harris, *The Last Stand* is the only journalistic book that deals solely with the Headwaters conflict. The journalistic and polemical treatments that attend briefly to the Headwaters conflict include Alston Chase, *In a Dark Wood: The Fight over Forests and the New Tyranny of Ecology* (New York: A Richard Todd Book / Houghton Mifflin Company, 1995); David Helvarg, *The War against the Greens: The "Wise-Use" Movement, the New Right, and the Browning of America* (Boulder: Johnson Books, 2004); Christopher Manes, *Green Rage: Radical Environmentalism and the Unmaking of Civilization* (Boston: Little, Brown, 1990); Jacqueline Vaughn, *Green Backlash: The History and Politics of the Environmental Opposition in the U.S.* (Boulder: Lynne Rienner Publishers, 1997); and Susan Zakin, *Coyotes and Town Dogs: Earth First! and the Environmental Movement* (New York: Viking,

Under corporatist governance, the state officially grants industries the ability to improve efficiencies via self-regulation. The state facilitates industry participation by forming official regulatory boards on which industry holds a majority of seats. The idea behind corporatism is that those people with the best knowledge of an industry's operations ought to be the ones who set the rules and govern the development of the industry. The state administers the programs and brings resources to the table. Corporatism, thus, is a formal institutional arrangement, not a description of the policy preferences of a regulatory board. The U.S. Forest Service, Bureau of Land Management, and the Fish and Wildlife Service never were managed by corporatist boards, and accordingly, national environmental litigation addressed agency action and statute interpretation. However, the states utilized corporatist boards more frequently, which complicated the shift to the modern environmental protection regime. Stephanie Pincetl correctly identified the role of California's Progressive-Era governance traditions in preventing land use and ownership reform in California, but largely without considering successful challenges to corporatist arrangements. The history of California forestry reveals persistent insurgence, intense local activism, and the breakdown of a corporatist, production-focused governance tradition. That history also points to the national consequences, most of them unintended, of the local activism.⁶

Litigation was the local reformers' most successful tool during the Redwood Wars. A small group of citizens leveraged the power of the courts and the Legislature, while simultaneously marshalling more power into their own hands. Their legal campaign accomplished four things that

1993). A few scholarly books that are focused on environmentalism briefly mention the Headwaters conflict, including Hays, *Wars in the Woods*, Carolyn Merchant, *Radical Ecology: The Search for a Livable World* (New York: Routledge, 2005) and Rik Scarce, *Eco-warriors: Understanding the Radical Environmental Movement* (Walnut Creek, Calif.: Left Coast Press, Inc., 2006). In their scholarly treatments, Hays and Merchant identify the wrong timber company and incorrect forest, respectively.

⁶ *Corporatism*, as used here, refers to the definition Ellis Hawley used in his classic article, "The Discovery and Study of a 'Corporate Liberalism,'" *The Business History Review* 52, No. 3 (Autumn 1978): 309–320. Hawley defines *corporatism* as a system whereby industries are guided by "officially recognized, non-competitive, role-ordered occupational or functional groupings . . . where the state properly functions as a coordinator, assistant, and midwife rather than director or regulator."

advocacy, protests, and direct action alone could not accomplish. First, citizen suits forced the state to legislatively abandon the official corporatist and development-only focus of state forestry laws. Second, the cases forced the Board of Forestry to back away from its traditional alliance with the timber industry at crucial times. Third, the litigation permanently blocked proposed harvests of many old-growth redwood groves. And finally, the cases drove President Bill Clinton, Governor Pete Wilson, and Pacific Lumber to negotiate a settlement of the Headwaters Forest conflict. As scholars have pointed out, public demonstrations created the necessary political will to act at times during the establishment of the modern environmental protection regime, advocacy helped build the national and state laws, and national litigation pushed the implementation of the laws along. In California, the long corporatist tradition mitigated the usefulness of those tools because the Legislature had previously abrogated its legislative duties with respect to the timber industry. As a result, citizens took their case to the courts to dismantle corporatism and production-focused timber regulation.⁷

The California forestry challenges deserve to be counted among the most important environmental law developments in the postwar United States because they fundamentally transformed an entire system of governance.

⁷ Some good analyses of general postwar citizen group legal history with respect to NEPA are Hays, *Beauty, Health, and Permanence*, chapter 14; Lazarus, *The Making of Environmental Policy*; William H. Rodgers, Jr., *Environmental Law* (St. Paul: West Publishing Company, 1994); Salzman and Thompson, *Environmental Law and Policy*; Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Alfred A. Knopf, Inc., 1971); David B. Sicilia, "The Corporation Under Siege: Social Movements, Regulation, Public Relations, and Tort Law since the Second World War," in *Constructing Corporate America: History, Politics, Culture*, eds. Kenneth Lipartito and David B. Sicilia (Oxford: Oxford University Press, 2004); and Richard B. Stewart, "A New Generation of Environmental Regulation?," *Capital University Law Review* 29 (2001): 21–182. With respect to the Forest Service, the Monongahela and Tongass cases are the most important. Paul Hirt's analysis of the use of the courts to challenge the "get out the cut" mentality of the U.S. Forest Service is a very important study, especially chapter 11, "From Gridlocked Conflict to Compromised Policy Reform, 1969–1976, in *A Conspiracy of Optimism*. Le Master, *Decade of Change* recounts the history of the way citizen suits, industry and congressional pressure to increase harvests, and Forest Service implementation of clearcutting, led to the creation of the Renewable Resources Planning Act of 1974 and the National Forest Management Act of 1976, which transformed Forest Service oversight and the agency's mission.

The environmental litigation of citizens at the federal level expanded, clarified, and enforced particular aspects of the modern federal environmental protection regime. For example, the National Environmental Policy Act (NEPA) and other laws expanded the responsibilities of federal agencies to non-commercial landscape resources, and they empowered citizens to participate in agency decisions and act as private attorneys general. And citizens turned to the courts using NEPA and other legal tools to force agencies to better consider public and ecological health and to comply with the new environmental laws. In the case of the Forest Service, local citizen groups sued the agency during the early 1970s and drove Congress to pass sweeping legislation that overhauled the agency's mission and oversight. However, as dramatic as the changes in environmental regulation and oversight were at the federal level, the fundamental structure of governance that was handed down from the Gilded Age and the New Deal remained unchanged. The U.S. regulatory system maintained its command-and-control structure. The Forest Service still maintained a client-agency relationship with the timber industry. The litigation campaign orchestrated by North Coast activists was different because it dealt with state law and private land, it gutted a governance structure and philosophy — corporatism — and it destroyed part of the vestigial remains of the corporatist tradition.⁸

The federal cases are important because they clarified legislative mandates and forced agency action to fulfill new legal obligations, but they did not reorder institutions in the same way as the North Coast activists' efforts in California. The most-studied litigation involved the implementation of the Clean Air and Clean Water Acts, the Endangered Species Act,

⁸ The most well-known environmental cases include *Scenic Hudson Preservation Conference v. Federal Power Commission*, 407 U.S. 926 (1972) because it was the first time an environmental group was granted legal standing. *Sierra Club v. Morton*, 405 U.S. 727 (1972) changed the traditional injury-in-fact standing requirements to allow citizens to use the citizen suit provisions of the federal environmental laws if they could demonstrate they had suffered recreational or aesthetic injuries. Previously, standing was granted only if the plaintiffs could demonstrate specific economic or personal harm to themselves. The literature also prioritizes the cases that clarified the 1970s environmental laws. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) clarified that the Endangered Species Act was to be implemented without consideration of the economic impact of protecting species. Likewise, *Lead Industries Association v. EPA*, 647 F.2d 1130 (Fed. Cir. 1980) established the principle that the EPA must *only* base air quality standards on health considerations, not on economic or technical considerations.

and the National Forest Management Act. Those cases helped define the scope and intent of the modern environmental protection regime. The literature is rich with analysis of those cases and their effects. This article focuses on the eight most important cases in the movement to transform California forestry governance. Because the movement set its sights on the fundamental transformation of institutions, increased regulation of private property, and giant redwoods, it led to, and was part of, one of the most important environmental battles of the late twentieth century in the United States. As such, its place in environmental law needs to be better situated than it currently is.

THE CORPORATIST TRADITION

The California Board of Forestry was a model of corporatism long before Herbert Hoover popularized the concept, and the Board of Forestry remained an official corporatist body until 1970. In 1885, California became one of the first states to regulate private timber land through the use of an appointed Board of Forestry, and that Board of Forestry appears to be one of the first incarnations of corporatist regulatory entities. As previously noted, under corporatist governance, the state grants industries the ability to improve efficiencies via self-regulation. The state facilitates industry participation by forming official regulatory boards on which industry holds a majority of seats. The California Board of Forestry was created and designed to ensure that those with intimate knowledge of the industry could guide the development of California timber operations. The board's mission was not to wrest control of the timber industry from large companies and landholders, but rather to efficiently manage the industry by safeguarding its interest in long-term timber harvests. However, the Board of Forestry was more committed to its economic development goals than it was to its conservation mission.⁹

⁹ Samuel P. Hays provides the classic interpretation of conservationism and progressivism in *The Gospel of Efficiency: The Progressive Conservation Movement, 1890–1920* (Cambridge: Harvard University Press, 1959), chapter 13. Hays argues that progressivism and conservationism were motivated by the efficient use of resources via the central guiding hand of executive branch scientific experts, not by “people versus the interests” politics. The Board of Forestry in California was similar, but different, in that the Board was not composed of scientific experts but rather experts of the industry.

The 1885 Board of Forestry was established to ward off the predicted timber shortage, and the governor appointed its five members based on their knowledge of timber industry operations. Rather than address harvest methods or forest regeneration to ward off the predicted shortage, the first Board of Forestry mostly concerned itself with recommendations to the Legislature to protect the inventories of the state's private timber operators. Indeed, from 1885 until its dissolution in 1893, no law was passed that dealt with a forestry issue other than the prevention of fires and trespassing. A singular exception in early California history was a law passed in 1868, long before the establishment of the board, that encouraged the planting of shade and fruit trees along highways in order to protect travelers from the heat and to provide a source of food in case of emergency.¹⁰

In 1905, the Legislature reorganized the Board of Forestry, but retained the corporatist structure. The new Board of Forestry was formally charged with preventing fires, protecting public and private land from trespass, managing the state parks, and purchasing clearcut land to manage as state forests to regenerate the timber supply. Timber harvesting methods were left to the judgment of individual timber operators. On the recommendation of the Board of Forestry, the Legislature passed five fire prevention laws, including the 1923 Compulsory Fire Patrol Act, as well as an insect abatement law in 1923, all in an effort to protect the timber supply.¹¹

In 1927, the Board of Forestry was reorganized within the new Department of Natural Resources, and the reorganization — still a body of five members appointed by the governor, based on knowledge of the timber

The state forester, overseen by the board, provided technical analysis and advice. Stephanie S. Pincetl, *Transforming California: A Political History of Land Use and Development* (Baltimore: Johns Hopkins University Press, 1999) argued that the progressive boards and commissions created during the Progressive Era directly contributed to land use and ownership patterns during the twentieth century because the regulatory boards were composed of business experts focused on development.

¹⁰ Chapter 498 of the 1868 Assembly; see C. Raymond Clar, *California Government and Forestry from Spanish Days Until the Creation of the Department of Natural Resources in 1927* (Sacramento: Division of Forestry, Department of Natural Resources, State of California, 1959) [vol. 1], 74 and 96–98.

¹¹ Clar, *California Government and Forestry* [vol. 1], 214, 297, 402, 411, 433, 445. And see Samuel Trask Dana and Myron Krueger, *California Lands: Ownership, Use, and Management* (Washington, D.C.: The American Forestry Association, 1958), 64 and 68, and Schrepfer, *Fight to Save Redwoods*, 23.

industry — officially recommitted its members to timber supply and water. The new Parks Commission took over control of the management of recreation resources. During the life of the third Board of Forestry, in addition to the usual fire prevention, state nursery, and regeneration laws and recommendations, a minimum diameter law that prohibited the harvest of trees smaller than eighteen inches in diameter was passed in 1943. That law marked the first time the Board of Forestry encroached upon the management prerogatives of private industry in the name of conservation, and it came long after a 1932 Department of Agriculture report that recommended selective cuts in Redwood Country in order to prevent deforestation.¹²

After World War II, the Legislature made some cosmetic changes to the regulatory regime, but maintained its corporatist orientation. Without legislative oversight, the Board of Forestry continued to support development but not forest conservation. For example, the 1943 law prohibiting the harvest of trees less than eighteen inches in diameter may appear to mark a move away from corporatism, toward greater legislative oversight, but that law was in fact another in the long history of regulations devised by businesses in order to protect their markets. In this case, the minimum diameter law protected big timber companies from competition from small, independent, “gyppo” contractors best suited to harvest small trees. Like the minimum diameter law, the 1945 Forest Practice Act that governed timber operations on private land also appeared to undercut corporatism while promoting conservationism. The law required the Board of Forestry to create forest practice rules to ensure that the state’s private timber operators used the best conservation practices. However, it also perpetuated industry self-regulation, and when the Board of Forestry created the rules, it predictably declined to include penalties for violations. Finally, in 1960 the Board of Forestry, despite the recommendations of North Coast timber reports, began approving large clearcuts because the timber industry wanted to capitalize on the housing boom and on decreased timber production

¹² See C. Raymond Clar, *California Government and Forestry [vol. 2]: During the Young and Rolph Administrations* (Sacramento: Division of Forestry, Department of Conservation, State of California, 1969), 36–37, 52, 121–125, 148–150, 189–274. Also see, Pincetl, *Transforming California*, 110; S.B. Show, “Timber Growing Practice in the Coast Redwood Region of California,” Technical Bulletin 283, March 1932, in USDA Technical Bulletins No. 276–300 (Washington, D.C.: U.S. Government Printing Office, 1932).

in the Pacific Northwest. None of these postwar logging developments is surprising. The Board of Forestry's own assessment of its postwar priorities were to prevent fire from destroying timber and to protect the timber industry from unfair competition from within — priorities that reveal the influence of the postwar housing boom on the timber industry as well as its commitment to helping the timber companies operate profitably.¹³

The resilience of California's corporatist Board of Forestry stands in stark relief against the rising tide of "modern environmentalism" and the resulting changes in environmental politics after World War II. The popularity of outdoor recreation increased dramatically, as did concern about suburban development and humankind's impact on the planet. As a result, national environmental groups like the Sierra Club and The Wilderness Society grew in size and stature. And local groups arose to combat local pollution, local land management, and suburban development. While the nation's environmental attention swung from nuclear fallout to Dinosaur National Monument to The Wilderness Act, the California Board of Forestry remained beyond reproach for the most part. Outside of loud complaints, no active opposition to the board's operations was apparent until the late 1960s. And why would there have been? Most of the state's residents did not live near enough to timber lands to witness the increased logging and clearcutting. The Save The Redwoods League purchased grand redwood groves and created parks out of them for recreationists and scientists. Appreciation of the non-economic values of forests did not become widespread until well after World War II. And the timber industry was a major contributor to California's postwar prosperity, just as it was nationally. As a result, residents of the North Coast seemed unwilling to bite the hand that fed them, and other Californians were not concerned with North Coast logging.¹⁴

¹³ C. Raymond Clar, *California Government and Forestry* [vol. 2], 36–37, 52, 121–125, 148–150, 189–274. Also see, Pincetl, *Transforming California*, 110; Dana and Krueger, *California Lands*, 69, 70, 71, 187, 188, 192–193; Pincetl, *Transforming California*, 162–165; and Michael G. Barbour, et al., *Coast Redwood: A Natural and Cultural History* (Los Olivos, Calif.: Cachuma Press, 2001), 188.

¹⁴ Samuel P. Hays and Roderick Nash provide classic discussions about the changing attitudes of the American public toward natural resources and landscapes during the nineteenth and twentieth centuries (Hays, *Beauty, Health, and Permanence* and Nash, *Wilderness and the American Mind*). See also, J.W. Penfold, "The Dinosaur

Challenges to the Board of Forestry's predominance first emerged in the 1950s, when citizen groups such as the Sierra Club complained about the rate of timber harvests and the prolific use of clearcutting in Redwood Country. As a result, the Legislature took steps to increase its oversight of the timber industry. In 1962, the Legislature commissioned a report that concluded that the forest practice rules "failed to provide adequate enforcement" to protect public values in water, fishing, and recreation." In 1967, another legislative report concluded that the rules needed to be broadened if California were to avoid major damage to its most important watersheds. A final legislative committee study of the forest practice rules concluded in 1971 that logging was one of the primary causes of the 80 percent decline in salmon and steelhead runs in Northern California. The agitation of the Sierra Club and others thus helped undercut confidence in the corporatist regulatory regime by pressuring the Legislature to study the industry in more detail.¹⁵

Controversy," *Sierra Bulletin* 36, No. 10 (December 1951); Rome, *Bulldozer in the Countryside*; Stephen M. Spencer, "Fallout: The Silent Killer," *The Saturday Evening Post*, August 29, 1959; and McGee Young "From Conservation to Environment: The Sierra Club and the Organizational Politics of Change," *Studies in American Political Development* 22 (Fall 2008): 183–203. See Pincetl, *Transforming California*, 163, for a discussion of the new pro-timber attitudes of North Coast residents after World War II.

¹⁵ See Henry Sadler, "Winter Damage in Redwood Parks," *Sierra Bulletin* 41, No. 8 (October 1956): 12–18; Peggy Wayburn and Edward Wayburn, "Our Vanishing Wilderness," *Sierra Bulletin* 42, No. 1 (January 1957): 6–9; George Ballis, "Havoc in Big Trees," *Sierra Bulletin* 42, No. 5 (May 1957): 10–11; Peggy and Edward Wayburn, "Bulletin," *Sierra Bulletin* 44, No. 9 (December 1959); Peggy Wayburn, "The Tragedy of Bull Creek," *Sierra Bulletin* 45, No. 1 (January 1960): 10–11; Newton B. Drury, "Chapter II — Bull Creek Story: Redwoods and You," *Sierra Bulletin* 45, No. 4 (April/May 1960): 10–13; and Susan R. Schrepfer, *The Fight to Save the Redwoods: A History of Environmental Reform, 1917–1978* (Madison: University of Wisconsin Press, 1983), 108–110, 112, 117, 144; and Pincetl, *Transforming California*, 162–165, regarding the 1950s Sierra Club and Fish and Game complaints; Assembly Interim Committee on Natural Resources, Planning and Public Works, *Findings and Recommendations Related to the Forest Practice Act, 1961–1962*, quoted in Sharon Duggan and Tara Mueller, *A Guide to the California Forest Practice Act and Related Laws* (Point Arena, Calif.: Solano Press Books, 2005), 1; Assembly Subcommittee on Forest Practices and Watershed Management, *Man's Effect Upon the California Watershed, 1965–1967*, quoted in Duggan and Mueller, 1–2; Committee on Salmon and Steelhead Trout, *An Environmental Tragedy*, 1971, quoted in Duggan and Mueller, 2. The history of state legislators, agency employees, and environmentalists pushing these studies and reforms still needs to be told. For this study, the fact

THE DESTRUCTION OF CORPORATISM

The inability, or unwillingness, of the Board of Forestry to accommodate the public's desire to consider the non-commercial values of the forest led directly to citizen actions that repealed the 1945 Forest Practice Act and the Board of Forestry it authorized. In the late 1960s, Bayside Timber Company obtained a logging permit from the board for land in San Mateo County, near Santa Cruz. Down-slope residents objected to the logging plan because of projected erosion and watershed damage, and successfully pressured the county Board of Supervisors to reject Bayside's road-building permit. Bayside Timber subsequently sued the county, but in 1971, the First District Court of Appeal in California ruled in favor of the county's right to block the logging. The court declared that the 1945 Forest Practice Act unconstitutionally delegated legislative authority to "persons pecuniarily interested in the timber industry."¹⁶

The court identified two main problems with the 1945 act, despite recent amendments. First, the act authorized the governor to appoint a five-person board comprising three representatives of the timber industry, one from the grazing industry, and one from the general public. Second, all forest practice rules were to be approved by two-thirds of the timber owners in any forest district before being finalized by the Board of Forestry. While the *Bayside* case was working its way to appeal in 1970, the Legislature attempted to fix the self-regulation problem by increasing the size of the Board of Forestry to seven members. The additional two members were to be from the general public with "an interest in and knowledge of the environment." The court noted that the additional Board of Forestry members did not change the fact that two-thirds of a district's private timber owners had to approve all forest practice rules, and so the court declared the 1945 act unconstitutional. As the first successful attack on the Board of Forestry's independence, the *Bayside*

they took place, and the framework they set up, are the most important aspects of that history because it is that framework that led to the changes in law during the 1970s that gave citizens greater access to the bureaucracy and courts. See Henry J. Vaux, *Timber in Humboldt County*, California Agricultural Experiment Station Bulletin 748 (University of California, 1955); William D. Pine, "Humboldt's Timber: A Present and Future Problem," pamphlet (Eureka, Calif.: Humboldt County Board of Supervisors, 1952).

¹⁶ *Bayside Timber v. Board of Supervisors*, 20 Cal. App. 3d 1, 7 (1971).

decision marks the beginning of citizen actions to overhaul California's forestry regime.¹⁷

Subsequent passage of the 1973 Forest Practice Act, as NEPA did in 1970 for federal environmental protection law, marked a sea change in private land use law in California because the law was designed to shift the state's focus toward resource conservation, and it deputized the citizenry. The new law reflected the more powerful status of scientists in postwar environmental politics and was based on the 1972 UC Davis Report's recommendation of a system of "resource conservation standards to protect watersheds and ecological values." The law charged the Board of Forestry and the Division of Forestry it oversaw with creating forest practice rules to end the depletion of timber resources, "giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment and aesthetic enjoyment." The law additionally required timber companies to submit Timber Harvest Plans before any new cutting and to allow the Department of Fish and Game and the Water Quality Control Boards to comment on the plans.

The most important sections of the new law for citizen groups provided greater citizen oversight of the Timber Harvest Plan process. The new law mandated public review of Timber Harvest Plans before final approval, and another section allowed citizens to challenge the Department of Forestry (CDF) and the Board of Forestry decisions in court (following the model of the NEPA and the federal Clean Air and Water Act amendments of 1970 and 1972, respectively). The citizen suit provision specifically allowed citizens to sue CDF and the Board of Forestry to obtain judicial review of administrative decisions. Additionally, the state Code of Civil Procedure granted citizens the right to challenge discretionary agency actions. Environmental activists eagerly embraced these new tools and were able to aggressively use the citizen suit provisions because, unlike federal environmental cases,

¹⁷ Forest Practice Act, § 4572, as amended in 1970, quoted in *id.*, at 9. Sharon Duggan, "Citizen Enforcement of California's Private Land Forest Practice Regulations," *Journal of Environmental Law & Litigation* 8 (Spring 1993): 291–315. Duggan rightly argues that *Arcata* (see next section) provided motivation for citizens to watchdog the timber harvest plan review process (p. 4). However, *Bayside* marks the beginning of the citizen watchdog era because citizens and citizen groups pressured the county Board of Supervisors to reject a harvest plan and argue the unconstitutionality of the 1945 FPA on appeal.

issues of standing regarding environmental group plaintiffs never became an issue in California. The courts had long recognized an exception to the specific economic injury/interest test for cases involving a “public right . . . to procure the enforcement of a public duty.” The new act also reconstituted the Board of Forestry with five members from the public, three from the forest products industries, and one from the livestock industry, a move naively meant to break the timber industry’s grip on the board. Out of this system, a legal and political battle arose over control of board policies and California’s last unprotected ancient forests.¹⁸

“HITTING THE DONKEY”: FORCING OUT DE FACTO CORPORATISM WITH CONTINUED LITIGATION

ARCATA AND GALLEGOS: TWO EARLY STEPS TO FORCE BOARD COMPLIANCE WITH CEQA AND FPA

The Board of Forestry, like its federal counterparts, largely resisted its new responsibilities during the 1970s, and citizens continued to challenge the state’s corporatist tradition for logging regulation, just as citizen groups challenged federal agency actions under NEPA. In 1973, over the objections of the National Park Service, the Board of Forestry ruled that clearcutting in the Redwood Creek watershed did not harm Redwood National Park. It also approved an Arcata National Corporation harvest plan within the watershed. The Natural Resources Defense Council, in line with their federal efforts to clarify and enforce NEPA, sued Arcata National and the state forester, arguing that the plan did not adequately consider environmental harm as required by the California Environmental Quality Act (CEQA, the state equivalent of NEPA), which required environmental

¹⁸ Institute of Ecology at the University of California, Davis, *Public Policy for California Forest Lands* (UC Davis, 1972), quoted in Duggan and Mueller, *Guide to Forest Practice Act*, 2–3. See Pincetl, *Transforming California*, 167–168, and Barbour, *Coast Redwood*, 188–189. For a detailed review of the sections of the 1973 Forest Practices Act (Pub. Res. Code § 4511 et seq.), see Duggan and Mueller, 6–9 and 790–796. The citizen suit provision of the FPA is contained within Pub. Res. Code § 4514.5. The ability to challenge discretionary actions is found in Code of Civ. Pro. §§ 1085 and 1094.5. See Duggan and Mueller, 797–798, for a discussion of issues of standing in California.

impact studies prior to any state agency taking actions that could cause significant environmental impacts. The law also required state agencies to propose mitigations for environmental impacts. Arcata National argued that CEQA guidelines did not apply to the Timber Harvest Plans because plan approval was a ministerial duty of the state forester, not a discretionary action. Superior Court Judge Arthur Broaddus ruled in 1975 that Timber Harvest Plans were a discretionary action and thus governed by CEQA, and further ruled that the content of the contested harvest plans failed to fulfill the Environmental Impact Report requirement of CEQA. Development-focused corporatism was hit with a second major blow when Arcata National unsuccessfully tested the industry and the Board of Forestry's autonomy in a 1976 appeal of Judge Broaddus' ruling.¹⁹

The Board of Forestry's continued resistance to its duties to CEQA and the non-economic mandates of the Forest Practice Act encouraged citizens to continue their legal challenges to corporatism. In 1978, Sonoma County residents Francine Gallegos and Louise Patterson, along with the Camp Meeker Improvement Association, obtained a writ of mandate to negate the Board of Forestry's approval of a Chenoweth Lumber Company harvest plan, one that the Department of Health concluded would "threat[en] . . . the quantity and quality of water in the Camp Meeker area." In a sequence of events that became a pattern through the 1980s, CDF rejected the Chenoweth harvest plan based on the Department of Health's concerns, but Chenoweth appealed to the Board of Forestry, the board overturned CDF's dismissal, and citizens sued.

Gallegos et al. successfully argued that the *Arcata* ruling did not fully capture all of the ways CEQA applied to timber plans. Specifically, they charged the Board of Forestry with failure to comply with CEQA requirements because the Board of Forestry had not based its decision on "substantial evidence" and had not responded to public comments regarding

¹⁹ *Natural Resources Defense Council, Inc. v. Arcata National Corp.*, 59 Cal. App. 3d 959 (1976); 58 Ops. Cal. Atty. Gen 250 (1975). See Schrepfer, *Fight to Save Redwoods*, 194 and 197, for a discussion of the Board's refusal to heed National Park Service orders to enforce the California Forest Practice Act and stop logging in the watershed. The California Environmental Quality Act is California Public Resources Code §§ 21000–21006, 21050, 21060–21072, 21080–21098, 21100–21108, 21150–21154, 21156–21159.9, 21160–21162, and 21165–21177.



GIL GREGORIO PROTESTING CORPORATISM.

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the Chenoweth harvest plan. The appellate court agreed with Gallegos et al. and the *Arcata* court that harvest plans had to fulfill CEQA requirements for Environmental Impact Reports. The *Gallegos* court went even further and demanded that the board and state forester had to respond *in*

writing to public comments regarding significant environmental impacts of a harvest plan, and that the response needed to explain the state forester's decision in a "reasoned" manner based on "substantial evidence." Even though official corporatist rule had ended, the industry would continue to appeal to the corporatist-leaning Board of Forestry when bureaucrats threatened to block logging plans. The Board of Forestry denied the industry's appeals only after repeated defeats in court during the 1980s and 1990s demonstrated that the *Gallegos* ruling had to be heeded.²⁰

The *Gallegos* and *Arcata* decisions provided the foundation for nearly all subsequent local citizen challenges of harvest plans. The two rulings required that harvest plans fully comply with CEQA, including: the requirements that other relevant agencies be consulted, that feasible alternatives and mitigation be implemented, that the agency make the harvest plans available to the public, and that the agency respond to public comments in a reasoned manner. CDF, the Board of Forestry, and the timber industry resisted these mandates, but, as described below, EPIC and other groups sued to force compliance with the laws and court precedents. It was through these legal channels that local citizens chipped away at the Board of Forestry's corporatist orientation, forcing it to step back from its traditional alliance with the timber industry several times during the late 1980s and 1990s.²¹

EPIC v. JOHNSON: A SUCCESSFUL MODEL

Although the Sierra Club was instrumental in the fights over Redwood National Park and in the 1976 amendments to the Forest Practice Act, and continued to play a major role in California logging politics, the legal campaign to destroy the corporatist traditions of the Board of Forestry was largely driven by a small group of North Coast residents committed to the

²⁰ Barbour, *Coast Redwood*, 189–190. A writ of mandate compels a public agency to correct prior actions not consistent with the law. *Gallegos v. California State Board of Forestry*, 76 Cal. App. 3d 945 (1978).

²¹ In addition to the published court opinions and regulations, Sharon Duggan offers a detailed analysis of codes, laws, and rulings of the 1970s regarding CEQA, the Timberland Productivity Act, and the FPA. She also provides analysis of a few of the subsequent rulings related to defining the laws regulating timber harvesting in California that this article does not cover. See Duggan, "Citizen Enforcement."

conservationism and ecological environmental values set forth by Gifford Pinchot (first chief of the U.S. Forest Service) and decidedly uninterested in state or national politics or citizen groups, except where needed to effect local land management changes. This cadre included Humboldt and Mendocino residents Kathy Bailey (state chair of California Sierra Club's state forestry program and the person responsible for convincing national Sierra to partner with locals on the litigation effort), Sharon Duggan (a native North Coast attorney working in the Bay Area), and other activists who established the Environmental Protection Information Center (EPIC).²²

EPIC was formed in 1977 in southern Humboldt County (approximately 200 miles north of San Francisco along the coast) by residents Robert Sutherland (who changed his name to The Man Who Walks in the Woods), Ruthanne Cecil, and other activists. EPIC was initially an ad hoc group that worked on local environmental issues, but in 1981, EPIC was formally incorporated with a broader set of goals:

- 1) preserve critical old growth forest remnants and the biological diversity they contain;
- 2) reduce the degradation of timberlands through improvement of forest practices (toward sustainability);
- 3) stabilize the local economy through sustainable production in healthy, diverse forests;
- 4) educate the citizenry regarding their public interest in the forests, its intrinsic value, and the avenues of influence available to them through state and federal agencies; and
- 5) channel information on environmental matters of all kind.²³

The local organization from the small town of Garberville (population approximately 2,000) quickly became a major player in logging regulation by aggressively using the citizen suit provisions of CEQA and the Forest Practice Act to challenge Board of Forestry actions. In doing so, EPIC's actions paralleled the legal actions of national environmental groups that increasingly turned to the courts in response to the Reagan administration's decreased enforcement of environmental laws. Unlike the national efforts,

²² See Schrepfer, *Fight to Save Redwoods*, 129–228, for a detailed account of the 1968 and 1978 efforts to create Redwood National Park.

²³ "Organizational History and Goals," undated, Archives of the Environmental Protection Information Center, "EPIC Publications" binder, EPIC offices, Redway, California.



SOME OF THE EARLY EPIC FAMILY MEMBERS. IN ITS EARLY YEARS, EPIC EMBODIED MUCH OF THE EARLY MEMBERS' 1960S COUNTERCULTURE AND POLITICAL IDEALS: AN ORGANIZATION THAT WOULD BE RUN BY THE COMMUNITY, NOT "HOITY-TOITY" MIDDLE-CLASS DONORS, AS THE MAN WHO WALKS IN THE WOODS EXPLAINED TO THE AUTHOR.

Photographer Unknown. All rights reserved by the Environmental Protection Information Center.

however, EPIC's work was built on a local vision of responsive government and sustainable communities that would produce timber, jobs, and wildlife habitat in perpetuity. However, forestry operations were governed at the state level, and endangered species law at the state and national levels, so the local activists were forced to engage in litigation and politics outside their local region in order to effect local change, just as groups such as the Headwaters Alliance and the Oregon Natural Resources Council (ONRC) were forced to engage the federal courts and the Forest Service to protect local landscapes on federal land during the 1970s and 1980s. Unlike the Pacific Northwest movement, however, nearly all of the national environmental groups chose

not to engage. EPIC drove the litigation strategy, and they often split the bills with the Sierra Club — but only on the insistence of Kathy Bailey and because of her ability to convince the California Sierra Club of the importance of the work.²⁴

Though the locals' goals were broad, they were focused on local quality of life. Bailey, Duggan, Woods, Richard Geinger, and the other local activists involved in the campaign against corporatism were local activists first and foremost, and, as told by Woods, if they could have avoided state and national authorities, they would have. For example, Bailey, Geinger, and Sutherland moved to the North Coast in the early 1970s after burning out in the anti-war movement and the counterculture of the Bay Area. Bailey and Sutherland grew up in the Midwest, and Geinger grew up in the Northeast. They all came from middle-class backgrounds and moved west to be near the natural beauty of the region. After moving to the North Coast to escape politics, each was drawn back in because of the local behavior of timber companies. During the late 1970s, Bailey successfully orchestrated a county initiative to ban the use of Agent Orange on logged-over land. Nearly simultaneously, Sutherland, Geinger, Cecil, and Marylee Bytheriver (a founder of EPIC who assisted as a paralegal in preparing its cases) successfully worked to stop Humboldt timber companies from aerially spraying pesticides on the countryside. As Bailey explained it, she re-engaged in politics locally out of concern for her children's health

²⁴ From "Organizational History and Goals." See Roger W. Findley, et al., *Cases and Materials on Environmental Law*, 6th ed. (St. Paul: Thomson/West, 2003), 688–689. See Durbin, *Treehuggers*, for the story of local Oregonians and Oregon groups that fought to stop logging on federal lands during the spotted owl conflict regarding the implementation of NFMA. According to Woods, the original EPIC bylaws were clear that EPIC was only to work at the local (Southern Humboldt) political arena, on purely local issues. With respect to the Sierra/EPIC relationship: Woods and Bailey both confirmed that the Sierra Club's litigation role was to help fund the litigation and to give the plaintiffs additional clout in front of Superior Court judges. EPIC attorneys and staff crafted and drove the actual litigation. In fact, when I corresponded with the Sierra Club litigation team about tracking down their files on the Headwaters cases, the director of the team told me that the only person at Sierra directly involved with the litigation was Bailey, who was a volunteer organizer, not an attorney. EPIC led the litigation teams, and they sometimes hired lawyers from the Sierra Club Legal Defense Fund, which, despite its name, is not a part of the Sierra Club. SCLDF changed its name during the 1990s to Earthjustice to end the confusion.

and education, and she only really wanted to work on Mendocino issues. Likewise, Sutherland and Geinger were interested in Southern Humboldt watershed, forest, and human health. Duggan was a North Coast native, and her interest in forestry litigation stemmed from a concern about the rapid changes in the landscape and forest health of the North Coast. Duggan grew up while the local timber companies were selling their land to Georgia-Pacific and Louisiana-Pacific, which led to increased industrial timber operations, including greatly expanded clearcuts and the related watershed damages. That their litigation efforts had state and national implications was due to the avenues available to the activists to pursue local change, not because they set out to change state or national law.²⁵



ATTORNEY SHARON DUGGAN.

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²⁵ Kathy Bailey, interview by author, Philo, California, March 20, 2007; Kevin Bundy, interview by author, April 26, 2007, San Francisco; Sharon Duggan, interview by author, Oakland, April 27, 2007. Locals grew concerned about the state of North Coast forestry during the early 1970s when the Atlanta-based Georgia-Pacific acquired The Union Lumber Company of Mendocino County as well as surrounding family ranches in what locals referred to as an “unprecedented consolidation of land.” See Lynwood Carranco and John T. Labbe, *Logging the Redwoods* (Caldwell, Idaho: Caxton Printers, 1975), 77; David Cross, “Sally Bell Redwoods Protected! Sinkyone Coast Purchased for Park,” *Earth First! Journal* 7, No. 3 (February 2, 1987): 1–4. Richard Geinger, interview by author, Redway, California, March 22, 2007; Paul Mason, interview by author by phone, February 16, 2007; Robert Sutherland, interview by author, Arcata, California, April 22, 2008 (all recordings and handwritten notes in possession of author). Sutherland told me that he only wanted EPIC to work on issues within southern Humboldt County and that he wanted to deal with them in the local arena. However, because timber harvesting on private land involved state regulation, they had to engage state agencies. And, when the state courts and agencies proved to be a dead end, they based their case on federal law (ESA) once the marbled murrelet was designated a threatened species.

EPIC's first lawsuit, *EPIC v. Johnson*, was initiated in 1983, and resulted in a landmark appellate decision that paved the way for much of the environmental community's forestry reform efforts in California, especially in the state's remaining unprotected and privately-owned old-growth forests. The *Johnson* case challenged a 75-acre harvest plan on Georgia-Pacific land in northern Mendocino County, near the Sinkyone Wilderness State Park. The Department of Forestry approved the clearcutting of the Sally Bell Grove, an old-growth redwood grove and the last remaining stand of trees in the immediate area. The grove was situated on a steep slope bound by the Pacific Ocean to the west and clearcuts on the other three sides. Thus, the grove acted as the hill's "keystone" by anchoring the slope's soil and preventing it from wasting into the ocean. The grove also contained a Native American Archeological site. EPIC and the Sinkyone Council prepared to challenge G-P logging plans in Sally Bell Grove throughout the summer of 1983. They prepared an on-the-ground resistance and a legal attack for any logging plans in the Sally Bell Grove. The on-the-ground resistance plan was developed in consultation with the group Earth First!, and it offered the EPIC lawyers the time they needed to get to court when logging began.²⁶

In court, EPIC and the Department of Forestry (CDF) made arguments that were notably similar to those made by plaintiffs and defendants, respectively, in nearly every case dealing with old-growth forests between 1983 and 1997. Sharon Duggan successfully argued that CDF, in approving the plan, had violated three CEQA requirements: first, CDF had not adequately responded to public comments on the harvest plan; second, CDF failed to consider the cumulative impact of the harvests on the hillside; and third, CDF failed to consult with relevant agencies with jurisdiction over the project (in this case the Native American Heritage Commission). CDF did not dispute EPIC's claims. Instead, it argued that, according to the rules, it could consider only the Forest Practice Act when approving plans. Therefore, CEQA's requirements about consultation, cumulative impact, and public comments were irrelevant to Timber Harvest Plans. It appears that CDF and the timber industry were hoping for a judgment that would

²⁶ Environmental Protection Information Center, Inc. v. Johnson, 170 Cal. App. 3d 604 (1985), 624, n. 10 re: "keystone" determination; Cross, "Sally Bell Redwoods," 1-4; Duggan, Geinger, and Sutherland interviews and correspondence with author.



OUT OF THE COURTROOM AND INTO THE WOODS. WHEN EPIC CHALLENGED GEORGIA-PACIFIC AND THE CALIFORNIA DEPARTMENT OF FORESTRY OVER THE SALLY BELL GROVE HARVEST PLAN IN 1983, PROTEST AND DIRECT ACTION PLAYED A CRITICAL ROLE IN THE SOUTHERN HUMBOLDT/NORTHERN MENDOCINO COMMUNITY'S STRATEGY. EARTH FIRST! CO-FOUNDER MIKE ROSELLE (UPPER RIGHT) WAS RECRUITED BY THE MAN WHO WALKS IN THE WOODS (LEFT OF ROSELLE, WITH HEADBAND) TO HELP LOCAL ACTIVISTS ORGANIZE DIRECT ACTIONS TO PREVENT LOGGING ACTIVITY UNTIL EPIC COULD OBTAIN A TEMPORARY RESTRAINING ORDER.

Photo by Debbie Unterman. All rights reserved.

overturn the previous rulings because they made the same arguments as in *Arcata* and *Gallegos*. At the same time, CDF contended that, contrary to EPIC's claim, it implicitly addressed the cumulative effects of its decisions by minimizing the impact of each individual project. That assessment of cumulative impact analysis — coupled with CDF's continued use of the argument that CEQA did not apply to harvest plans — demonstrated the degree of intransigence within the agency. By definition, one cannot analyze cumulative impact without studying past and future plans. The court

ruled for EPIC in 1985, striking another blow to the Board of Forestry's industry-friendly economic development priorities.²⁷

The *Johnson* case provided EPIC with valuable experience, a strong precedent, and successful arguments. EPIC and other citizens used the *EPIC v. Johnson* model with increasing frequency and success. Prior to *Johnson*, there were only two published opinions for cases challenging harvest plans. After *Johnson*, environmental groups would challenge plans every year. But if EPIC members thought the Board of Forestry and the timber industry would take this third defeat at the hands of environmental groups as a signal to reform the Forest Practice Rules and Forestry methodology, they were wrong. CDF and the timber industry would continue to argue they were exempt from CEQA, despite the growing stack of precedents building against that position. Duggan believed that the agency and the industry were hoping they would eventually find a judge or panel that would agree with them, which made sense given their long experience with self-regulation.²⁸

USING THE *JOHNSON* MODEL ON THE DONKEY AGAIN AND AGAIN

Woods was convinced that the North Coast activists needed to continue to combine litigation with direct action in order to “hit the donkey” enough to make it move. Activists had overturned official corporatism in 1971, and they won three important cases during the subsequent fifteen years that reinforced the Legislature's orders that the Board of Forestry end its corporatist traditions which allowed the industry to determine its own harvest practices. After the *Johnson* decision, North Coast activists steeled themselves to break corporatism's back by challenging harvest plan after harvest plan using the *Johnson* model. From 1985 to 1995, the Board of Forestry, EPIC, Sierra Club, and the timber industry jostled repeatedly in court after court over the same issues. What became known as Headwaters Forest became the focal point of many of the battles between environmental activists and corporatism, but the activists challenged harvest

²⁷ See *EPIC v. Johnson* for discussion of EPIC's arguments, CDF's arguments, and the court's analysis of the arguments.

²⁸ Duggan, “Citizen Enforcement,” 12 n. 55, cites *Gallegos and Seghesio v. County of Napa*, 135 Cal. App. 3d 371 (1982) as the two previous THP challenges.

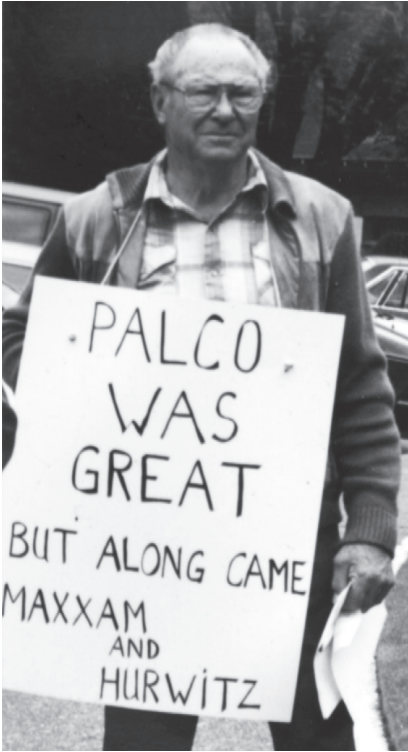
plans all over the North Coast that were rubber-stamped by CDF. The litigation during that period produced three major state precedents and one major federal precedent that drove wedge after wedge between the Board of Forestry and the industry.

MAXXAM I AND II, AND NATIVE SALMON: PUTTING AN END TO RUBBER-STAMPING

The leveraged buyout of Pacific Lumber by Maxxam in 1985 was the key event that propelled Headwaters Forest into the middle of the citizen challenges to California's corporatist tradition. Environmental activists, shareholders, and timber workers all initially reacted negatively to the buyout, creating an under-siege atmosphere in the rural North Coast of California. The Murphy family-run Pacific Lumber was in many respects a model corporate citizen. But perceptions changed after the company was taken over by Texas-based Maxxam Corporation in 1985. The Murphy-run company had sold and donated 20,000 acres of their land for parks, avoided clearcutting since the Great Depression, and left 30–70 percent of the trees on the land by practicing selective logging in old-growth stands.

Despite the “family business” image, by 1975, no investor group owned more than five percent of Pacific Lumber stock, and, by 1985, the company was a full-fledged conglomerate working in real estate, agriculture, cutting and welding, and lumber. However, Pacific Lumber retained its small-town image up to the time of the Maxxam takeover. Maxxam, led by Charles Hurwitz, purchased Pacific Lumber for nearly \$900 million, financed by “junk bond” legend Michael Milken.²⁹ The takeover of Pacific Lumber by Hurwitz, a well-known “corporate raider” that hostilely acquired undervalued companies — such as McCulloch Oil and Simplicity Patterns — and sold off their assets, generated local concern about the future of Pacific Lumber. Specifically, the takeover allowed John Campbell, the executive

²⁹ John Campbell, interview by author, Fortuna, California, April 24, 2008 (recording and handwritten notes in possession of author). The various diversification efforts can be found in the annual reports of The Pacific Lumber Company 1976–1982, Selected Corporate Annual Reports on Microfiche, 1975–1983, Library of Congress, Business Reading Room, Washington, D.C.; Evelyn Nieves, “Lumber Company Approves U.S. Deal to Save Redwoods,” *The New York Times*, March 3, 1999, A1, and “The Headwaters Forest Stewardship Plan: A Citizens’ Alternative to Maxxam Management of Headwaters Forest” (Redway, Calif.: The Trees Foundation, 1997), 20.



THE MORALITY TALE. WHEN MAXXAM ACQUIRED THE PACIFIC LUMBER COMPANY, MANY ACTIVISTS, COMMUNITY MEMBERS, AND JOURNALISTS ATTRIBUTED THE COMPANY'S INCREASED TIMBER HARVESTS AND CLEARCUTS TO THE JUNK BOND DEBT OF THE NEW COMPANY.

Unknown Photographer. All rights reserved by the Environmental Protection Information Center.

vice president of Forest Products, to implement his long-held desires to reinstitute clearcutting and to harvest the remaining old growth on the property in order to maximize the timber growth rate of the land and to maximize operational efficiency. The new management of the forest drew the attention of local environmentalists, and for the next thirteen years, the conflict between Pacific Lumber and local activists escalated and peaked just before the Headwaters Deal was finalized in 1999. Many local residents feared Maxxam would cut quickly and leave the area without its major employer while devastating its forest land. Earth First! activist Greg King trespassed on Pacific Lumber land to determine the size and quality of the company's holdings. In the process, King discovered a vast old-growth redwood forest in the middle of the property and named it Headwaters Forest because several major streams and rivers originate inside the forest.³⁰

³⁰ Jane Kay, "Last Stand: Fighting for the Tall Trees," *San Francisco Examiner*, December 16, 1995; Elliot Diringer, "Cutting a Deal on Redwoods: A Tangled Tale of Trees, Takeovers and a Texas S & L," *The San Francisco Chronicle*, Sept. 4, 1996, A1; Andy Caffrey, "Partners in Crime: Bill Clinton, Pete Wilson, Wall Street and the Death of the Redwood Forest," *Save Headwaters Forest Report*, 3; "Deal Saves Giant Redwoods: 2,000-year-old Forest on Pacific Coast to be Made a Preserve," *The Gazette* (Montreal, Quebec), March 3, 1999, A14; Nieves, "Lumber Company" and "Spring Headwaters Campaign," *Headwaters Updates* 30 (Winter 1998), 5; John Campbell, interview with author, Fortuna, California, April 24, 2008. During our interview, Campbell made it

Between 1987 and 1993, both EPIC and local Earth First! activists ratcheted up their efforts. Court after court found the Board of Forestry guilty of operating under a de facto policy of automatically approving Timber Harvest Plans without considering the plans' relationship to the Forest Practice Act or CEQA. The policy was a product of a century of corporatism during which the Board of Forestry's primary duty was to facilitate timber harvests. Especially on Pacific Lumber land, Earth First! activists kept constant tabs on logging activity, as locals had done during the Sally Bell Grove conflict, and they staged dramatic direct actions and protests, most notably Redwood Summer in 1990 and the tree-sits and near constant occupations of the Headwaters Forest old-growth groves. Tensions on the North Coast grew as logging was delayed, activists swarmed the county, the spotted owl conflict raged to the north, and as EPIC won in court after court. The three major precedent-setting EPIC cases during this time period — *EPIC v. Maxxam I*, *EPIC v. Maxxam II*, and *Californians for Native Salmon and Steelhead Association, et al. v. California Department of Forestry (Native Salmon)* — forcefully chipped away at that corporatist tradition and strengthened the role of citizens as private attorneys general. Then, in 1994, the California Supreme Court delivered a crushing blow to corporatist autonomy and the legal argument that CEQA did not apply to harvest plans in *Sierra Club and EPIC v. Board of Forestry*.³¹

In 1987, the ruling in *Maxxam I* bolstered the court's *Johnson* decision that CEQA rigorously applied to harvest plans and the decision further discredited Forestry and its practices. EPIC asked for writs of mandate against three Pacific Lumber old-growth harvest plans (two within Headwaters

clear that the Maxxam takeover did not radically alter the forest management plans of Pacific Lumber; rather, the takeover made it easier and more urgent for Campbell to increase old-growth logging activity.

³¹ Environmental Protection Information Center, Inc. v. Maxxam Corp., Humboldt Superior Court No. 79879 (1987); Environmental Protection Information Center, Inc. v. Maxxam Corp., 4 Cal. App. 4th 1373 (1992); Californians for Native Salmon and Steelhead Association, et al. v. California Department of Forestry, 221 Cal. App. 3d 1419; Sierra Club, et al. v. State Board of Forestry, 7 Cal.4th 1215. The best sources regarding the direct action activity on North Coast are Bari, *Timber Wars*; Dunning, *From the Redwood Forest*; Hill, *Legacy of Luna*; Darryl Cherney, interview with author, Redway, California, April 23, 2008; and Alicia Littletree, interview with author, Ukiah, California, May 20, 2008 (all recordings and notes in possession of author).

Forest) because the plans lacked cumulative impact studies and mitigation alternatives. CDF tried a new argument in this case; it argued that its hands were tied because, even though the harvests would cause significant environmental harm, the land had been zoned for timber production by the Timber Production Act, which, according to CDF, superseded the court's *Johnson* ruling. In Humboldt County Superior Court, Judge Frank Peterson ruled for EPIC and found that CDF had "rubber-stamped" the plans because the plans were approved before they were completed. Additionally, the judge found that CDF intimidated Fish and Game biologists to prevent them from filing non-concurrence opinions that objected to the plans. Fish and Game opposed the plans because they did not contain any scientific information about the presence of species of concern, like the marbled murrelet, in the harvest areas.³²

By 1987 a pattern was developing: EPIC and Sierra Club would challenge old-growth harvest plans based on the *Johnson* model, local Earth First! activists would stage direct actions to delay logging activity, and Pacific Lumber would experiment with defense arguments. For example, *Maxxam II* challenged two more 1987 Pacific Lumber harvest plans within Headwaters Forest and one Simpson Timber plan. Simpson Timber withdrew its plan, but Pacific Lumber fought the writs of mandate. The company abandoned the unsuccessful agency arguments regarding CEQA's irrelevance to harvest plans and the superseding authority of the Timber Production Act. Instead, the company challenged the scientific analysis that its land was important for species of concern. Pacific Lumber argued that Fish and Game should not have concerned itself with the species on its land because the species were not dependent upon old-growth redwood groves. The company also claimed that the state already owned enough redwood land to maintain viable populations of species that were dependent on old-growth redwoods.

In addition to introducing a new industry argument, *Maxxam II* marked the initial, if seemingly reluctant, split between the timber industry

³² EPIC v. Maxxam, Humboldt Superior Court No. 79879, Aug. 13, 1987, Peterson, J., pp. 2–4. The private attorney general doctrine was first used by Judge Jerome Frank in *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) to award attorney's fees to a person "vindicating the public interest." Many environmental laws passed as a part of the new social regulations include citizen suit provisions.

and the Board of Forestry. The trial judge ruled against Maxxam and again accused CDF of “rubber-stamping” and intimidation. The appellate court also disagreed with the company’s argument, but the case was dismissed in 1992 for three reasons, two of which were victories of a sort for EPIC, and one a symbol of the determination of Pacific Lumber to carry out its new timber regime: 1) Pacific Lumber felled the trees in one of the harvest areas between March 1988 and May 1988 — the date EPIC obtained a preliminary injunction; 2) CDF adopted emergency regulations covering old-growth timber plans, marbled murrelet and northern spotted owl habitat, and cumulative impact analysis; and 3) EPIC and Sierra Club obtained an injunction on the harvest plan for Lawrence Creek (the second contested plan) in 1989 via *Sierra Club v. State Board of Forestry* (discussed in the next section). The appellate court, while dismissing the case, recognized the influence of citizen groups on the Board of Forestry’s behavior, writing:

The record . . . leaves no doubt that environmental litigation, such as EPIC’s Preliminary Injunction in this case, played an important role in bringing about changes in departmental policies. To this extent, the issue of mootness is a product of EPIC’s own success.

The judge then strengthened EPIC’s position as a private attorney general by forcing Pacific Lumber to pay EPIC’s attorney fees. The company was able to log in the disputed area, but the pressure brought on the Board of Forestry by the litigation caused the agency to stray from the hardline position that CEQA did not apply to Timber Harvest Plans as evidenced by the agency’s creation of the new regulations without a direct court order. The new regulations played a key role in breaking down development-focused corporatism because the Board of Forestry responded to citizens and courts, not to the wishes of the timber industry, and the rules recognized the Board of Forestry’s responsibility to non-economic forestland resources.³³

³³ *Environmental Protection Information Center, Inc. v. Maxxam Corp.*, 4 Cal. App. 4th 1373 (1992). The marbled murrelet regulations are found in Cal. Code Regs., tit. 14, §§ 895.1, 912, 919.13, and 919.14. The spotted owl regulations are CCR, tit. 14, §§ 919.6(d)(1), 919.9, and 919.10. The cumulative impact regulations are in the FPR, §§ 985.1, 898, and 912.9.

Protecting Headwaters Forest was not EPIC's sole project.³⁴ In fact, one of the non-Headwaters cases filed by EPIC, *Native Salmon*, left the strongest precedent of the cases concluded between 1987 and 1993. In this case, EPIC and friends challenged a 1988 Eel River Sawmills harvest plan because CDF failed to analyze cumulative impact, and failed to respond to public comments. Sixty-five additional plans were added to the suit, and EPIC argued that the failure to fulfill CEQA requirements was a de facto CDF policy. Eel River Sawmills withdrew its plans, and before the case went to trial, CDF approached EPIC and Californians for Native Steelheads to negotiate a settlement. An agreement was signed on September 23, 1993. CDF agreed to further rule changes that put the agency in compliance with CEQA regarding cumulative impact analysis, mitigation, and public comments. The appellate decision opened the door for environmental groups to challenge policies wholesale, not just individual harvest plans, and the settlement forced written changes in CDF practices that EPIC had been fighting for over a decade to achieve.³⁵

SIERRA *v.* BOARD OF FORESTRY: THE DONKEY IN THE CALIFORNIA SUPREME COURT

In 1994, the California Supreme Court sided once and for all with the citizen groups with respect to the relevance of CEQA to timber operations on

³⁴ During my interviews with 1980s and 1990s EPIC staff members Richard Gering (staff forester), Sharon Duggan (EPIC attorney), and Kevin Bundy (EPIC media spokesman during the mid-1990s), each of them expressed the anxiety EPIC felt about the size, direction, and scope of the Headwaters conflict, and each of them stated that EPIC wanted to continue its challenges to CDF even while Headwaters work consumed ever-more time and energy.

³⁵ See "Settlement Agreement, CDF, Californians for Native Salmon and Steelhead Association, EPIC, and Fred 'Coyote' Downy," unprocessed EPIC Archives, Eureka, California. *Native Salmon*, Humboldt Superior Court No. 83329 (1989), was dismissed as moot when Eel River withdrew its harvest plans. EPIC appealed the dismissal, 221 Cal. App. 3d 1419 (1990), and the case was reinstated, prompting CDF to negotiate with EPIC. The other two cases settled were *EPIC v. CDF*, Humboldt Superior Court No. 92DR0005 (1992), which resulted in an agreement with Eel River Sawmills protecting Tom Long Creek, and *Coastal Headwaters Assn. and EPIC v. CDF*, Mendocino Superior Court No. 68285 (1995), where the trial court ruled in favor of CDF, but Save The Redwoods stepped in and bought Goshawk Grove from Eel River Sawmills. See "Sanctuary Forest Moving Forward," *Branching Out*, affiliate newsletter published by the Trees Foundation (Winter 1998–99): 3.

private land. In 1988, Pacific Lumber remained confident in the corporatist tradition of the Board of Forestry, but *Sierra Club v. State Board of Forestry* seriously damaged the allegiance between the board and industry. *Sierra Club v. State Board of Forestry* challenged two more Pacific Lumber plans in the Lawrence Creek area of Headwaters Forest and became EPIC's second major precedent-setting case and the fourth major blow to California's corporatist timber regime. CDF initially rejected the two Pacific Lumber harvest plans because they did not include marbled murrelet surveys. Pacific Lumber, like Chenoweth Lumber in 1976, appealed to the Board of Forestry, claiming it did not have to provide any survey information because the rules did not specifically require the surveys. Following the tradition of maximum production and deference to the industry, the Board of Forestry overruled its Department of Forestry and approved the plans. EPIC and Sierra Club filed for a writ of mandate to rescind the board's approval of the plans. On March 20, 1989, the board convinced Judge John Buffington that the harvest plans would not result in any significant impact on the environment, and Buffington denied EPIC's writ of mandate. EPIC and Sierra Club appealed the decision, and after the appellate court overturned Buffington's ruling, the board withdrew its support of Pacific Lumber in the case. The Board of Forestry further distanced itself from corporatist tradition when it issued the new regulations that caused the dismissal of *Maxxam II*. The two board actions demonstrated the success of citizen litigation in destabilizing the traditional relationship between the board and industry.³⁶

When the state Supreme Court ruled against Pacific Lumber, it delivered industry independence a staggering blow. As it ended one conflict, the court escalated another when it increased the legal demands on the industry and the board to protect non-timber forest resources. Like previous lower courts, the court ruled that the Board of Forestry had to comply with CEQA and the Forest Practice Act alike and that the board had the authority to require new information from timber companies (such as wildlife surveys) that the Forest Practice Rules did not explicitly require but that the Department of Forestry deemed necessary to comply with CEQA guidelines. In fact, the court further underscored the board's non-timber responsibilities when it argued that *not* requiring timber companies to submit enough information to assess

³⁶ *Sierra Club, et al. v. State Board of Forestry*, 7 Cal.4th 1215 (1994).

and *prevent* environmental damage violated CEQA. The victory for EPIC and Sierra Club forced the Board of Forestry to further reform its practices regarding ancient forests, and forced it to recognize its responsibilities for old-growth-dependent species. During the ten years after *Johnson*, citizen litigation exposed and discredited the de facto corporatist regime, destroyed the autonomy the board and the industry once enjoyed, and drove a wedge between the industry and the agency. However, legal battles over non-timber resources escalated because the agency, and especially the timber industry, yet again failed to embrace the ruling.³⁷

OWL CREEK: ENDANGERED SPECIES AND NATIONALIZATION OF THE CAMPAIGN

In 1997, the U.S. Supreme Court refused Pacific Lumber a writ of certiorari in the *Marbled Murrelet* case, reinforcing the North Coast activists' twenty-plus-year fight to include protection of habitat and ecological health in private forest management practices. The fight over corporatism was played all over the North Coast, but the fight over non-commercial responsibilities was mainly fought in the Headwaters Forest arena, and it was a fight citizen groups largely won. The federal court case reinforced the Board of Forestry's obligation to citizens and non-timber forest values, revised endangered species case precedent, and unintentionally drove President Clinton, Governor Wilson, and Charles Hurwitz to the negotiating table in an attempt to end the conflict over Headwaters Forest. EPIC filed suit in federal court because three of changes that had occurred in Northern California. First, the murrelet was protected under both the California and federal Endangered Species Acts. Second, Pacific Lumber seems to have decided that it could no longer count on the Board of Forestry to protect its interests so it became more aggressive and independent with its court actions. And third, state judges began to rule against EPIC.

The listing of the marbled murrelet as a "threatened" species on October 1, 1992 proved to be vital to EPIC's challenge of Pacific Lumber's old-growth harvesting plan. The state case challenging an old-growth harvest plan in the Owl Creek Grove of Headwaters Forest floundered in a sea of competing

³⁷ *Id.*

motions and conflicting rulings, especially after the murrelet's federal status changed and Pacific Lumber worked feverishly to log the area. For example, on November 2, Superior Court Judge Morton Colvin rejected Pacific Lumber's motion to dismiss that case due to what the company perceived as Judge William Ferroggiaro's anti-company bias. However, Pacific Lumber simultaneously persuaded a court clerk to schedule a hearing with a visiting judge on a motion to dismiss the case, and on November 22, despite Judge Colvin's prior rejection of Pacific Lumber's dismissal motion, visiting Judge Leighton Hatch dismissed the case.³⁸

Then the conflict turned even uglier. On November 24, 1992, the California Department of Fish and Game spoke to Pacific Lumber and told them not to resume logging in Owl Creek without complying with the federal Endangered Species Act, and the company agreed to consult with the U.S. Fish and Wildlife Service before logging. With Earth First! activists conducting nightly hikes to Owl Creek, Pacific Lumber resumed logging on November 28, Thanksgiving weekend, without consulting Fish and Game or Fish and Wildlife. It was the first time in the sixteen-year career of Pacific Lumber's chief timber operations manager, Dan McLaughlin, that the company logged over Thanksgiving, and he asserted that Owl Creek was the only area harvested. The next day, Fish and Wildlife sent EPIC a letter informing it that the harvest constituted a "taking" in violation of the Endangered Species Act. The agency had told Pacific Lumber before November 28 that the company's partial surveys indicated murrelet occupation of Owl Creek. On December 1, 1992, the California appellate court issued an emergency stay of logging operations in Owl Creek.³⁹

³⁸ The marbled murrelet listing is 50 CFR Part 17, Federal Register 57, No. 191 (October 1, 1993), Rules and Regulations section RIN 1018-AB56. See EPIC brief before California Court of Appeal A059797 requesting a stay, December 1, 1992, pp. 4–8, unprocessed EPIC Archives, Eureka, California.

³⁹ *Marbled Murrelet v. Pacific Lumber*, C-93-1400, Feb. 25, 1997, 36, unprocessed EPIC Archives, Eureka, California. See Department of Interior memo 1-1-92-TA-81, Nov. 29, 1992, from Wayne White, FWS Field Supervisor, to EPIC attorney Mark Harris, unprocessed EPIC Archives; *EPIC v. Board of Forestry*, Emergency Stay Order A059797, Dec. 1, 1992; cert. denied by California Supreme Court S031969, May 20, 1993, Lucas, C.J.; Panelli and Baxter, JJ., concurring, unprocessed EPIC Archives; Alicia Littletree interview and map of Owl Creek hikes from Littletree's personal papers, Ukiah, California (copy of map in possession of author).

On April 16, 1993, EPIC filed suit against Pacific Lumber, the Department of Forestry, the Board of Forestry, Fish and Game, Fish and Wildlife, and Secretary of the Interior Bruce Babbitt in federal court, arguing that all the parties were responsible for allowing “harm” to a listed species in violation of section 9 of the Endangered Species Act. EPIC filed suit in federal court because they were frustrated about the state court proceedings and Pacific Lumber logging activities. Additionally, Macon Cowles — the lead environmental attorney in the Exxon Valdez oil spill litigation — suggested that EPIC sue in federal court. EPIC attorney Sharon Duggan agreed that the claimants would have a better chance in federal court because the Humboldt County judges were growing weary of having EPIC and Pacific Lumber in their courtrooms, and the Superior Courts did not have the resources or time to thoroughly review the massive administrative records compiled in the cases.⁴⁰

The cases against the agencies were dismissed later in 1993, and the case against Pacific Lumber was tried in August and September 1994. On February 27, 1995, Judge Louis Bechtle of the Ninth Circuit Court of Appeals placed a permanent injunction on the Owl Creek harvest area and found that “EPIC has proven, by a preponderance of the evidence, that marbled murrelets are nesting in THP-237” (the area of Timber Harvest Plan 237 at issue) and that Pacific Lumber had tried to minimize its detections of murrelets by neglecting PSG protocol, intimidating surveyors, sending doctored-up data sheets to state and federal agencies, and intimidating government witnesses.⁴¹

The Ninth Circuit upheld the decision on May 7, 1996, and the U.S. Supreme Court denied Pacific Lumber’s appeal on February 18, 1997. The permanent injunction was a landmark victory for EPIC, and the ruling became the first time the Endangered Species Act was used to stop logging on private land. The Ninth Circuit opinion also broadened the *Palila* standard for “harm” and “harass.” The ruling declared that “reasonable certainty” of “imminent” injury or death, not the discovery of actual injury or death — the standard the *Palila* cases established — was enough to invoke an injunction on a project. The Endangered Species Act gave EPIC

⁴⁰ Duggan interview; *Marbled Murrelet v. Pacific Lumber*, C-93-1400-FMS slip op. at 12 (N.D. Cal., Feb. 2, 1994), unprocessed EPIC Archives, Eureka, California.

⁴¹ *Marbled Murrelet v. Pacific Lumber*, 880 F. Supp. 1343, 1360 (N.D. Cal. 1995).



EPIC ATTORNEYS WITH PHOTO OF MARBLED MURRELET AFTER VICTORY IN *MARBLED MURRELET V. PACIFIC LUMBER* (1995), U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO; LEFT TO RIGHT: MARK HARRIS, SUSAN O'NEILL, STEVE CRANDALL, MACON COWLES.

Unknown photographer. All rights reserved by the Environmental Protection Information Center.

grounds to argue substantively and obtain permanent protection (rather than just forcing CDF to review its decisions). By doing so, EPIC and the federal courts sent a strong message to the Board of Forestry and to the timber industry that it could not take their responsibilities for non-timber forest values lightly.⁴²

The post-injunction legal strategy of Pacific Lumber led the Clinton administration to significantly alter Endangered Species Act implementation

⁴² *Marbled Murrelet v. Babbitt*, 83 F.3d 1060 (9th Cir. 1996); cert. denied, 519 U.S. 1108 (1997). See Salzman, *Environmental Law and Policy*, 267, for a brief discussion of the precedent-setting nature of *Marbled Murrelet v. Pacific Lumber*.



HIGH UP IN HEADWATERS FOREST.

Photo by the author. All rights reserved.

procedures and led directly to the public purchase of part of Headwaters Forest. After the permanent injunction on Owl Creek was finalized, Pacific Lumber filed a takings suit against the government, and the Clinton administration quickly decided to negotiate with Hurwitz and other land owners rather than fight takings suits or risk congressional action against the Endangered Species Act. In *Lucas v. South Carolina Coastal Council*, the U.S. Supreme Court ruled in 1992 that an injunction *could* result in a “take” of private land *if* the injunction prevented the owner from making *any* use of its land.⁴³ Hurwitz was willing to bet that he could convince the court that its *Lucas* ruling could apply to a Timber Harvest Plan, so it filed *Pacific Lumber v. United States* in May 1996. Additionally, the Republican-led Congress was threatening action to weaken Endangered Species Act protections. On September 28, 1996, the

⁴³ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

Headwaters Deal was signed, authorizing the California Legislature and Congress to purchase more than 7,000 acres of Headwaters Forest, allowing Pacific Lumber to file a Habitat Conservation Plan for the rest of its land, and dismissing the takings suit against the federal government. Thus, a trend began. The 1982 amendments to the Endangered Species Act permitted landowners to negotiate Habitat Conservation Plans with the federal government to accelerate species recovery and to avoid protracted litigation. The plans allow for some development of endangered species habitat so long as it was accompanied by a fifty-year plan to add additional habitat. From 1982 to 1994, however, only thirty-nine plans were issued. Between 1994 and 1998, more than 230 such plans were issued, including the Headwaters Deal negotiated with Pacific Lumber.⁴⁴ While most environmental groups viewed the agreement as insufficient to protect the ancient forest ecosystem, the case presented the Board of Forestry with a strong statement about the need to change its traditional ways of doing business.

The North Coast Redwood Wars were not nearly over in 1996, despite the resolution of the federal court cases. EPIC and North Coast Earth First! opposed the deal, and both groups continued their fights: EPIC fought to protect more old growth and to complete the destruction of de

⁴⁴ Findley, *Cases and Materials*, 970–971, 982. Also, John Campbell interview; Campbell commented on how the takings suit his company filed against the United States made Feinstein and Clinton eager to negotiate rather than have the Endangered Species Act “turned on its bottom.” Additionally, Paul Mason phone interview with author, March 12, 2007 (handwritten notes in possession of author). Mason discussed the fact that Senator Dianne Feinstein was eager to negotiate with Maxxam in order to end the conflict and prevent the Gingrich Congress from more aggressively pushing Endangered Species Act reforms. The 1982 amendments to the Endangered Species Act created § 10a, permitting the government to issue an Incidental Take Permit for development projects that would harm some members of an endangered species in exchange for a fifty-year Habitat Conservation Plan designed to increase population numbers overall. Section 10a was designed to provide land owners incentives to conduct good stewardship and keep ESA conflicts out of court. See U.S. Fish and Wildlife Service, *Status of Habitat Conservation Plans* (Washington, D.C.: U.S. Government Printing Office, 1997). Additionally, see Shi-Ling Hsu, “The Potential and Pitfalls of Habitat Conservation Planning under the Endangered Species Act,” *Environmental Law Review* 29 (October 1999): 10592–10601; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and *Pacific Lumber Company v. United States*, 96-257L (Fed. Cls.).

facto corporatism and the related resistance to managing private land for timber and non-timber resources. Earth First! fought to stop all logging in the old-growth groves via direct action. Famously, Julia Butterfly Hill sat in an ancient redwood for two years to protest the logging of old growth not included in the deal. Pacific Lumber filed for bankruptcy in 2007. And, in 2008, the California Supreme Court sided with EPIC in their challenge to the Sustained Yield Plan associated with Pacific Lumber's Habitat Conservation Plan.⁴⁵ In 2009, corporatism may have been on the decline, but the fate of Headwaters Forest was still up in the air.

CONCLUSION

To be sure, national institutions played a large role in the development of the environmental movement and federal environmental politics. The National Resource Defense Council, Sierra Club, Wilderness Society, State Public Interest Research Groups, and others helped push the major environmental laws of the 1970s through Congress, then watchdogged the agencies charged with executing the new laws. Business associations lobbied and litigated to ensure that the laws and regulations did not unduly hinder their operations.

But the California forestry battles were largely a local affair that involved local activists, with local goals, who used the tools available to force changes in local land management. The local history of the redwood litigation demonstrates two often-neglected features of postwar environmental politics: 1) the drive to change traditional institutional arrangements in order to accommodate specific local environmental goals, and 2) the watchdog tactics local environmental activists use to ensure the implementation of environmental laws. Working at both the national and state levels, citizens helped guide the development of the modern environmental protection regime by using their deputized status in court to clarify definitions, obligations, and rules. California's citizen groups also focused on transforming the institutions charged with managing local landscapes. The legal history of citizen challenges to the California Board of Forestry from 1969–1999 demonstrates a sustained interest in

⁴⁵ *Environmental Protection and Information Center v. California Department of Forestry and Fire Protection*, 44 Cal.4th 459 (2008).

conservation methodology as well as ecology, human health, and aesthetics. As Adam Rome pointed out in *Bulldozer in the Countryside*, conservationism was not cut off from modern environmentalism after World War II.⁴⁶ Sharon Duggan, Kathy Bailey, Woods, Richard Geinger, and the rest of the EPIC and California Sierra Club activists were committed to using their citizen attorney-general powers not only to protect endangered species, old-growth ecosystems, and human health, but also to force the timber industry and the state government to embrace more sustainable forest practices for their local communities. The byproducts of their efforts were the sweeping changes to state governance, forestry regulations for private land, and the implementation of the federal Endangered Species Act.

The center of gravity of environmental history has been shifting downward in recent years. Most early environmental historians focused on the sweeping national trends of postwar environmentalism and on the importance of industry, of national writers like Rachel Carson and Paul Ehrlich, and of the creation of the modern environmental protection regime. Robert Gottlieb and Adam Rome, among others, pushed the field to better consider on-the-ground environmentalism in the suburbs and urban areas. And, even though historians attend to local environmental politics, a D.C.-based narrative of modern environmental history continues to dominate policy and political history classrooms, as well as the popular media.

Local environmental activists in northern California took cues from national trends and events, yet forged their own path and local vision. Actions against private property set them apart from the national groups, which kept their distance from local activists so as not to jeopardize their bargaining positions inside the Capitol Hill Beltway. EPIC's goal was to change governance and timber practices on the North Coast alone, but they were forced to challenge state and national agencies, and thus political arrangements outside of the North Coast became collateral damage of the Redwood Wars. In order to more fully understand the development of the environmental movement and environmental politics, we need to examine the ways local people challenged tradition and forced state and

⁴⁶ Rome, *Bulldozer in the Countryside*, 8–9.

national institutions to adjust their actions the way the Board of Forestry, the California Legislature, Congress, and the Clinton administration did with respect to EPIC's court strategy.

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ENVIRONMENTAL
LAW

BOOK SECTION

THE CONSERVATION OF LOCAL AUTONOMY:

California's Agricultural Land Policies, 1900–1966

REBECCA CONARD

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THE CONSERVATION OF LOCAL AUTONOMY:

California's Agricultural Land Policies, 1900–1966

FOREWORD

W. ELLIOT BROWNLEE*

Earlier this year Selma Moidel Smith, the editor-in-chief of *California Legal History*, contacted me to let me know that she wished to publish Professor Rebecca Conard's 1984 Ph.D. dissertation, "The Conservation of Local Autonomy: California's Agricultural Land Policies 1900–1966," in *California Legal History*. Ms. Smith had discovered that I had been the chair of Conard's Ph.D. committee in the Department of History at the University of California, Santa Barbara and asked for my assistance in locating her. I was delighted by the news. The dissertation was superb, and even in 1984 I knew that it should be published.

Let me explain a few things about the dissertation and the career of Rebecca Conard.

She entered the Graduate Program in Public Historical Studies as one of its first Ph.D. candidates. Previously, she had been an English major at California State Polytechnic University, Pomona, received an M.A. in Folklore at the University of California, Los Angeles, taught in the English Department at American River College in Sacramento, and completed a very large oral history project on "Century Farm" families for the State

* Research Professor, Department of History, University of California, Santa Barbara.

Historical Society of Iowa. She arrived at UC Santa Barbara with a strong interest in the problems of farming and land stewardship.

In the Ph.D. program Rebecca built on these interests, working within our Public History program in all of its three tracks: the history of public policy, cultural resource management, and community history. But her emphasis on the public policy track, which encouraged historical research that shed light on contemporary policy issues, seemed to develop logically from her current interests. And, it promised to lead to a dissertation that would contribute equally to a career in professional practice or university research and teaching.

Early on within the public policy track, she took a course on the history of national land-use policy developed by my colleague Otis Graham. His course was stimulating but her emerging interests turned out to be more in the realm of state and local policy. During an early conversation with me regarding a dissertation that would explore some aspect of the history of agricultural land-use policies, I suggested that she think about the role of property taxation and rural zoning. I knew that these policies played significant roles in the economic development of Wisconsin, and I wondered about their importance in California.¹ I learned in that conversation that she had taken an undergraduate course in economic history in which she had become intrigued with Henry George and his single-tax ideas. This was an interest I shared, and I encouraged her to begin her dissertation exploration by studying the California setting of the single-tax movement. She began to read in the nineteenth- and twentieth-century history of state and local taxation and zoning policies, state and local politics, federalism, and economic development. Several years later she had an outstanding dissertation on the origins and enactment of the California Land Conservation Act of 1965 (commonly known as the Williamson Act), the Property Tax Assessment Reform Law of 1966, and the Open Space Conservation Amendment (adopted by California voters in 1966).

Throughout Rebecca's years in the Public History program, she continued to develop expertise not only in the history of public policy but also the full range of topics and approaches that lie within the practice of public history. Clearly, the public policy route was not likely to satisfy all of her intellectual interests within the emerging field of public history.

¹ See, for example, Vernon R. Carstensen, *Farms or Forests: Evolution of a State Land Policy for Northern Wisconsin, 1850-1932* (Madison: University of Wisconsin Press, 1958).

In 1982, two years before completing her dissertation, she joined with another Ph.D. candidate in Public History at UC Santa Barbara in founding PHR Associates, a public-history consulting firm. The combination of talent, place, and timing was ideal. The firm flourished, and Rebecca remained in private practice until 1992. Amid the excitement and demands of her entrepreneurship and pioneering in public history, including the preparation of dozens of highly professional technical reports and history publications for historic preservation projects and historic resource studies, the cost and distractions required to turn the dissertation into a book seemed daunting, and they remained so in the years to come.

Rebecca returned to full-time university life in 1992, becoming assistant professor and director of the Graduate Program in Public History at Wichita State University. At the same time, she cofounded another consulting firm, Tallgrass Historians, headquartered in her native Iowa.² By that time, she had developed a broad-gauged program of work in historic preservation, nature conservation, and community history. She was producing a stream of scholarly publications that included, in 1997, an award-winning book exploring the history of American environmentalism in the context of the history of Iowa's state parks and preserves.³ The following year she moved to the Department of History at Middle Tennessee State University. She directed its public history program until her retirement in 2016. During these years she became established as one of the most prominent international leaders of the public history movement, shaping the ideas that define the field, publishing and lecturing widely, contributing mightily to a variety of professional institutions and organizations, and winning awards. During 2002–03, she served as president of the National Council of Public History, the most important professional organization in the field.

When Selma Smith prompted Rebecca to think about publishing her dissertation, she returned to the topic of land-use planning in California. She made a few revisions, the most important of which was the reworking of the final chapter. It now includes a survey of the legislative and judicial

² To describe Rebecca as a native of Iowa is an oversimplification of a complicated and significant dimension of her life. See Rebecca Conard, "Public History and the Odyssey of a Born-Again Native," *The Annals of Iowa* 67 (Spring 2008): 165–180.

³ Rebecca Conard, *Places of Quiet Beauty: Parks, Preserves, and Environmentalism* (Iowa City: University of Iowa Press, 1997).

adjustments to the Williamson Act since 1965. But no major revisions were necessary because there has been virtually no new scholarship that would bear directly on the core narrative of the dissertation.

Back in 1984, I would not have guessed that this would be so. I assumed that the passage of California's Proposition 13 in 1978, the consideration of similar measures elsewhere, and the growing strength of anti-tax movements would stimulate substantial historical research on the structure and impact of sub-national taxation during the twentieth century. Since 1984, there has been, in fact, a surge in scholarship on the history of taxation in the United States. But the historians and other social scientists doing this work (including myself) have focused by and large on the national level. A few scholars have discussed state and local taxation perceptively and in depth, but most of them have concentrated on earlier periods.⁴ A few others have analyzed the setting and legacy of the adoption of Proposition 13 in California, and at least one study has looked closely at the intersection of state and national politics.⁵ But these scholars begin their analysis in the 1970s, and they have little to say about earlier reform movements or the impact of those movements on the taxation of the vast resources devoted to agriculture in California. As I came to discover first-hand, during the years when I served on the Assessment Appeals Board of Santa Barbara County (a board of equalization), the legislation that Rebecca analyzes enabled the creation of a massive system of classified property taxation that has survived the long-term homogenizing force of Proposition 13 on the assessment process. By 2015, at least 14.8 million acres of California's farmland were enrolled in Williamson Act contracts. This represented approximately 47 percent of California's farmland and about

⁴ The scholars who have focused on state and local taxation in earlier centuries include, for example, historian Robin Einhorn, *American Taxation, American Slavery* (Chicago: University of Chicago Press, 2016) and *Property Rules: Political Economy in Chicago, 1833–1872* (Chicago: University of Chicago Press, 2001), and economist Alan Rabushka, *Taxation in Colonial America* (Princeton and Oxford: Princeton University Press, 2008).

⁵ Leading examples of the scholarship on Proposition 13 include Isaac William Martin, *The Permanent Tax Revolt: How the Property Tax Transformed American Politics* (Stanford: Stanford University Press, 2008) and Arthur O'Sullivan, Terri A. Sexton, and Steven M. Sheffrin, *Property Tax and Tax Revolts: The Legacy of Proposition 13* (Cambridge: Cambridge University Press, 1995). On the subject of the politics of tax federalism, see Michael D. Berkman, *The State Roots of National Politics: Congress and the Tax Agenda, 1978–1986* (Pittsburgh: The University of Pittsburgh Press, 1993).

30 percent of the state's privately owned land.⁶ In other words, huge swaths of California's agricultural land still receive preferential taxation, despite Proposition 13, because of implementation of the Williamson Act.

Rebecca Conard is the first historian to explore the reasons for this outcome and to set this story within the larger history of land-use planning in California. In the process, she develops important insights into American federalism, emphasizing the potential for state-level political movements with roots at the local level to bring about significant fiscal change.

Rebecca's dissertation appears in print at a time that is quite possibly crucial for the future of the Williamson Act, as amended by the Legislature and interpreted by the courts.

On the one hand, economic pressures may significantly weaken the effectiveness of the Williamson Act structure in protecting agricultural and open land. As Rebecca has pointed out in her concluding chapter, the "Great Recession" that began in 2008 essentially ended the state subventions that had provided local governments with incentives to write Williamson Act contracts. Meanwhile, economic pressures for the expansion of the housing stock will diminish the interest of many localities in entering into contracts. For example, the demand for housing by Silicon Valley employees, coupled with the building by the California High-Speed Rail Authority of a bullet train between San Jose and Bakersfield, would encourage the kind of developmental leapfrogging in the Central Valley that the architects of the Williamson Act had hoped to discourage. Arguably, the people of California need to understand both the contributions of the Williamson Act and the economic pressures that now threaten to erode those contributions.

On the other hand, California's state government aspires to assume global leadership in environmental planning and innovation. If this impulse leads the state's political leaders or environmentalists to a wide-ranging discussion of land-use planning, Rebecca Conard's dissertation might well have a much greater impact on public policy than she hoped for in 1984.

Santa Barbara, California

August 31, 2017

⁶ California Department of Conservation, *The California Land Conservation Act of 1965: 2016 Status Report* (Sacramento: California Department of Conservation Division of Land Resource Protection [DLRP], December 2016).

THE CONSERVATION OF LOCAL AUTONOMY:

California's Agricultural Land Policies, 1900–1966

REBECCA CONARD

ACKNOWLEDGMENTS

It is not often that a thirty-some-year-old dissertation catches the attention of an editor, so one can imagine my incredulity when Selma Moidel Smith contacted me a few months ago to express interest in publishing it. Thus, my thanks first to Selma for offering me the opportunity to revive a project I fully intended to see through to publication when it was fresh, and for suggesting that I look at the appellate and Supreme Court case law in updating it for publication now. Special thanks also to W. Elliot Brownlee, who served as my major professor at UC Santa Barbara, and helped Selma track me down. Having directed several dissertations myself in the intervening years, I understand the disappointment he no doubt felt when my publication plans stalled, then fell off the agenda. It was a pleasure to work with Elliot again as I revised portions of the original manuscript.

Several organizations and individuals supported this endeavor many years ago. A dissertation fellowship from the Lincoln Institute of Land Policy in Cambridge, Massachusetts, enabled me to devote the academic year 1982–1983 to research and writing. Additional financial support came from the Sourisseau Academy at San Jose State University and a Humanities

Graduate Student Research Grant from the University of California, Santa Barbara.

Peter Detwiler, then director of the Governor's Office of Planning and Research, Local Government Division, provided me with office space in 1982 while I conducted research in Sacramento. During the same period, the late Joseph A. Janelli, then director of governmental affairs, and Russell Richards, then assistant to the president, California Farm Bureau Federation, arranged my entry into the federation's private archives in Sacramento. Lucas S. Stamos, then director of the Santa Clara County Planning Department, extended a similar courtesy and allowed me unrestricted access to the materials contained in the department's library.

The UCSB Interlibrary Loan Department staff cheerfully and expertly handled continual requests for materials. John Williamson, author of the 1965 California Land Conservation Act, and several other individuals, named in the bibliography, willingly granted interviews or responded to my written queries.

A shortened version of Chapter 1 was published as "Green Gold: 1950s Greenbelt Planning in Santa Clara County, California" in *Environmental Review* 42 (1985): 5–18, and other portions were published as "Suburban Encroachment on the Old North Forty: Effective Ways to Preserve Agricultural Land" in the *American Journal of Economics and Sociology* 42 (1983): 193–208.

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INTRODUCTION

In 1953, after a half-decade of unprecedented urban growth in the San Francisco Bay Area, fruit growers and county planners in Santa Clara County joined forces to implement exclusive agricultural zoning, hoping this device would curb municipal annexations and thereby contain rampant suburban sprawl. Local action touched off a state-level political debate over agricultural land conservation, which culminated in the California Land Conservation Act of 1965, commonly known as the Williamson Act, and the Property Tax Assessment Reform Law of 1966. With this legislation, the state adopted a voluntary-participation land conservation program based on property tax incentives for agricultural landowners and, more important, reinforced a long-standing state policy of allowing local governments to oversee land-use matters.

Post-World War II urban growth precipitated the farmland conservation movement, and the environmentalism of the 1960s and 1970s helped to sustain it. Between 1956 and 1980, nearly all fifty states adopted legislation to conserve a resource once considered to be inexhaustible: farmland. State laws embody diverse strategies for conserving agricultural land: preferential property tax assessment, deferred taxation, property tax credits against income taxes, inheritance tax benefits, agricultural districting, and agricultural zoning. Land banking, development rights purchase or transfer, and conservation easements are also among the strategies, although the amount of farmland that can be conserved with these tools is quite limited.

Tax-relief strategies are by far the most common, although often they are used in conjunction with agricultural districting, agricultural zoning, and/or restrictive contracts. As of 1981, forty-eight states had adopted tax-relief laws as all or part of the effort to conserve farmland.¹ This overwhelming tendency for states to enact tax relief provisions drew criticism from many quarters because such strategies are rarely attractive to agricultural landowners situated on the urban fringe where the potential profit to be realized from eventual land conversion outweighs the short-term tax

¹ Robert E. Coughlin and John C. Keene, senior authors and editors, *National Agricultural Lands Study: The Protection of Farmland* (Washington, D.C.: Government Printing Office, 1981), 56–60.

benefits. In short, what began as a movement to conserve farmland and thereby contain urban growth became, some say, a movement to maintain the status quo in farmland property taxation.² There is a certain amount of truth to such criticism. The negotiations behind the California Land Conservation Act certainly reveal the political clout of assorted agricultural interest groups in a state where agriculture is considered an essential part of the overall economy.

This study explores the political and economic aspects of land use on the local level, then examines the emergence of the Williamson Act within the larger context of twentieth-century state policies and politics affecting privately owned agricultural land. Chapter 1, a case study of agriculture and county planning in Santa Clara County, clarifies the local circumstances precipitating state action. Chapter 2 provides an overview of nineteenth century political conditions and the establishment of home rule in the 1879 Constitution, which placed local governments in control of the general property tax system. From 1900 to 1929 (Chapters 3 and 4), the state, building on the 1879 Constitution, expanded local control over the property tax and extended local government powers to include control over land-use planning. By 1930, California had created the essential foundation on which the Williamson Act would be created.

Federal New Deal programs, World War II, and postwar growth issues prompted the state to establish a succession of state planning agencies. These activities, discussed in Chapter 5, continually reaffirmed California's commitment to strengthening local governments by vesting them with regulatory power over land-use planning matters. In Chapter 6 the focus shifts back to Santa Clara County, where agricultural land conservation advocates managed to push a greenbelt measure through the state legislature. Then, in 1957, the California Farm Bureau Federation (CFBF) lent its full support to preferential taxation for agricultural lands. For the next decade, as detailed in Chapter 7, the CFBF helped steer state legislators toward a land conservation act that fit long-established state policies. The Williamson Act of 1965 and the Property Tax Assessment Reform Law of 1966 placed agricultural land conservation within the purview of local

² See, for instance, John Brigham, "The Politics of Tax Preference" in *Property Tax Preferences for Agricultural Land*, eds. Neal A. Roberts and H. James Brown, 97-117 (Montclair, N.J.: Allenheld, Osmun for the Lincoln Institute of Land Policy, 1980).

governments. The 1966 Open Space Conservation Amendment linked agricultural land conservation with a related effort among environmentalists to preserve open space through enforceable restrictions on land use.

A broader view of the political milieu in which the California Land Conservation Act was conceived enables one to see that this law protected more than farmland and open space: it reaffirmed local control over land-use matters, at least initially. The California experience thus raises interesting questions about intergovernmental relations, and I used American federalism as an analytical framework to argue that the Williamson Act primarily conserved local autonomy in land-use decision making.

Revisiting this study gave me an opportunity to examine how the Williamson Act is holding up a half-century after its passage. On the one hand, the biennial status reports of the California Department of Conservation, which monitors the Williamson Act program, tend to underscore its long-term success at protecting the productivity of nearly half of California's agricultural lands. On the other hand, a review of the legal and legislative history pertaining to the Williamson Act since 1965 reveals a gradual shift in administrative power from the local to the state level, which affirms the validity of analyzing this still-controversial law within the scholarly apparatus of American federalism.

At one point, I considered whether the shift was great enough to require a new title. Was the Williamson Act still conserving local autonomy? The Great Recession that began in 2008 has clouded the picture. Among other things, the recession triggered new changes in public finance, and, as a result, the state no longer subsidizes the property tax relief that counties and cities extend to agricultural landowners under the Williamson Act. This change has the potential to shift administrative power back to local governments, at least to some degree. In short, the power dynamic is still in play. For this reason, I decided the title should stand because it calls attention to the core element that makes the Williamson Act an intriguing piece of legislation.

A word of caution with respect to the review of appellate and state supreme court decisions, as well as legislative actions, that have reshaped the Williamson Act since 1965, which are covered in Chapter 8. I use the term "review" because time and circumstances did not permit a thorough examination of the legislative record and the entire corpus of case law

pertaining to the Williamson Act. Of necessity, I opted for the 30,000-foot perspective; thus, I surely have missed legal decisions and legislative enactments that would add both substance and nuance to the story. Still, the aerial view yields a defensible argument, but I trust that my interpretation will be challenged by new blood in the future.

Rebecca Conard
Iowa City, Iowa
September 11, 2017

Chapter 1

“SLURBANIZING” THE “VALLEY OF THE HEART’S DELIGHT”

“The Valley of the Heart’s Delight” is a quaint tag that community boosters could have hung on any one of many valleys throughout California as they appeared before World War II. The place that bore this particular label, however, was the Santa Clara Valley, located at the southern tip of the San Francisco Bay, and many of its inhabitants considered it aptly named. Orchards stretched across and down the valley, annually enveloping urban pockets in springtime blossoms. In 1921, Roscoe D. Wyatt, manager of the San Jose Chamber of Commerce, produced a film entitled “The Valley of the Heart’s Delight,” with which he intended “to tell the rest of the world about the wonders of the Santa Clara Valley” and promote San Jose “as the future hub of a vast urban and agricultural complex.” Three decades later his dream began to go awry. The label “slurb” is an insult that critics of urban sprawl could have hurled at dozens of conurbations that appeared after World War II, but Karl Belser, the Santa Clara County director of planning, first used it to describe the Santa Clara Valley.¹

¹ Robert C. Fellmuth, *Politics of Land: Ralph Nader’s Study Group Report on Land Use in California* (New York: Grossman Publishers, 1973), 32; Karl Belser, “The Making of Slurban America,” *Cry California* 5, no. 4 (1970): 1–21.

The following story might well have been told about several formerly scenic, rural areas of California: the dairies of Orange County or the San Fernando Valley, the orange and lemon groves of the San Gabriel and Pomona valleys, or the vegetable fields of coastal Santa Cruz County. The Santa Clara Valley story is important, however, because growers and planners in the county took their fight against aggressively expanding cities to the state legislature. The determined local effort to rescue farmland from the clutches of urban developers, more so than anywhere else in the state, provoked a decade-long battle to enact state agricultural land conservation legislation.

During the early 1940s, several cities across the nation struggled with the urban problems accompanying wartime mobilization and production, but no one fully anticipated the postwar urban growth awaiting Los Angeles and San Francisco. California's scenic mountains, fertile valleys, and rock- and kelp-strewn coast have lured settlers ever since the flamboyant Gold Rush era, when the state's population increased an average of 15.2 percent annually for a decade. For the most part, people have come seeking humble amenities rather than the promise of riches: better jobs in a mild climate. Following the abnormal 1850 to 1860 surge, the state's population grew yearly by about two-to-five percent (see Table 1). Natural increase accounted for as much as one-third of this annual growth, but most of California's new inhabitants consistently have been migrants. From 1900 to 1979, migrants, foreign and domestic, accounted, on average, for about three-fourths of each year's population increase.²

² Margaret S. Gordon, *Employment Expansion and Population Growth: The California Experience, 1900–1950* (Berkeley: University of California Press, 1954), 6, found that net migration accounted for 87.1% of the total California population increase in the decade 1900–1910, 83.8% in 1910–1920, 83.6% in 1920–1930, 85.5% in 1930–1940, and 72.2% in 1940–1950. Her figures therefore indicate that natural increase ranged between 12.9% and 27.8% between 1900 and 1950. Data compiled by and published in Robert K. Arnold, et al., *The California Economy, 1947–1980* (Stanford: Stanford Research Institute, 1961), 28, indicate that between 1941 and 1949 natural increase accounted for 23.2% of the new population, and between 1950 and 1959 the corresponding figure was 38.5%. Data compiled by the Bank of America for the Commonwealth Club and published in "Economic Problems of California's Rapid Growth," *Transactions of the Commonwealth Club* 51 (December 1956): 11, indicate that net civilian migration accounted for about 60% to 85% of decade-to-decade population increase from 1860 to 1955.

TABLE 1. CALIFORNIA POPULATION INCREASE

Decade	Average Annual Increase	
	Number	Percent
1850–1859	28,700	15.2
1860–1869	18,100	4.0
1870–1879	30,400	4.5
1880–1889	34,900	3.4
1890–1899	27,200	2.0
1900–1909	89,200	4.8
1910–1919	104,900	3.1
1920–1929	225,000	5.2
1930–1939	123,000	2.0
1940–1949	367,900	4.4
1950–1959	519,000	4.1
1960–1969	399,800	2.5
1970–1979	395,300	2.0

Data to 1959 compiled by Robert K. Arnold, et al. *The California Economy, 1947–1980* (Stanford: Stanford Research Institute, 1960), 25. Data from 1960–1979 from *Census of the United States, 1970, 1980*.

Conventional wisdom holds that the post–World War II immigration was unprecedented. Looking at absolute numbers, this is certainly true. Moreover, the annual rate of population increase during the 1940s and 1950s was substantially higher than that of the 1930s. But the growth rates of the 1940s and 1950s were hardly unprecedented. The state experienced a much greater rate of population growth during the 1920s than during any other decade after 1860. Then the population grew slowly during the 1930s, making the influx of the 1940s and 1950s appear unusually great. In addition, postwar population growth was most concentrated, as it had been in the past, near the state’s major urban areas (see Table 2). Thus, California’s rate of population growth was not unprecedented. The actual number of people moving annually into urban areas, however, exaggerated a settlement pattern that emerged in the 1920s, when scattered outlying communities, especially

TABLE 2. COUNTY POPULATION GROWTH THAT EXCEEDED STATEWIDE GROWTH 1940–1950 AND 1950–1960 (IN COUNTIES WHERE THE 1940 POPULATION WAS 50,000 OR MORE)

Area	Percent of Total Population Increase	
	1940–1950	1950–1960
The State	53.3	48.5
San Francisco Metro Area		
Contra Costa	197.6	—
Marin	61.8	71.5
San Mateo	110.8	88.6
Santa Clara	66.1	121.1
Solano*	113.4	—
Los Angeles Metro Area		
Orange	65.4	225.6
Riverside	61.1	80.1
San Bernardino	74.8	78.8
San Diego Metro Area		
San Diego	92.4	85.5
Other Counties		
Fresno	54.9	81.3
Kern	69.0	—
Monterey	78.7	52.0
Sacramento	62.7	81.4
Santa Barbara	—	72.0
Stanislaus	69.9	69.9
<p>* Solano County had a population of 49,118 in 1940. (—) indicates that growth was less than statewide average. Source: Census of the United States, 1940, 1950, 1960.</p>		

those around Los Angeles, began to acquire the populations that made them suburbs of larger cities.³

During the 1940s, growth was most remarkable in the San Francisco Bay Area, where the population doubled from 517,709 in 1940 to 1,062,245 in 1950.⁴ Three counties experienced the largest increases: Solano and Contra Costa to the east of the city proper, and San Mateo to the south. It was during the 1940s that the Bay Area began to acquire the population that transformed San Francisco from a city into a metropolitan region. During the 1950s, overall state population growth declined, but it continued unabated in the Bay Area as well as in the Los Angeles and San Diego metropolitan areas. To the north, the direction of urban growth shifted to the southern tip of San Francisco Bay in Santa Clara County; in the south, the Los Angeles metropolitan area swelled to fill Orange County and began pushing into San Bernardino and Riverside counties. Population growth in Santa Clara and Orange counties attracted attention because both had well-established identities as prosperous small-farming areas and both quickly lost their predominantly rural character to urban growth during the 1950s. In Santa Clara County, urban dwellers increased by 183.9 percent, while rural dwellers decreased by 61.1 percent. In Orange County, the urban population increased 361.4 percent, while the rural population decreased by 58.4 percent.

Such tremendous urban growth obviously had to affect the land resources in these two counties (see Table 3). In Santa Clara County, farmland decreased by 269,000 acres between 1945 and 1964, an average loss of 17,000 acres per year. The greatest losses were sustained between 1945 and 1950, when an average of 23,000 acres of farmland annually disappeared. In Orange County, although farmland was not converted to urban use as early, the drop in agricultural acreage, when it came, was sudden and nearly as steep. Between 1945 and 1950, the number of acres in Orange County

³ Judith Norvell Jamison, *Coordinated Public Planning in the Los Angeles Region* (Los Angeles: UCLA Bureau of Governmental Research, June 1948) includes a useful table of population growth from 1910 to 1947 that is arrayed by towns and cities as they were incorporated; see Table II, 4–5.

⁴ U.S. Bureau of Census, *Population Census, 1940, 1950*. The 1950 census lists eight counties or parts of counties combined to form the “San Francisco–Oakland urbanized area”: Alameda (part), Contra Costa (part), Marin (part), Napa (part), San Francisco County and City, San Mateo (part), Santa Clara (part), Solano (part).

farmland actually increased, but dropped in the early 1950s from 383,000 to 344,000 acres, a figure that held constant until the late 1950s. Then, between 1959 and 1964, the county lost about 100,000 acres of farmland to nonagricultural uses, an average loss of 20,000 acres per year for five years.

TABLE 3. NUMBER OF FARMS AND ACRES IN FARMLAND, 1945–1964

County	1945	1950	1954	1959	1964
Santa Clara					
Acres	727,000	589,000	590,000	529,000	458,000
Number	5,914	5,282	4,953	3,345	2,631
Orange					
Acres	347,000	383,000	344,000	346,000	243,000
Number	5,621	5,713	4,593	3,352	1,542
Source: U.S. Bureau of the Census, City and County Data Book, 1949, 1952, 1956, 1962, 1967.					

Both counties, moreover, lost well over half of their farms during those two decades. Nowhere else in the state were population growth and its geographic consequences so pronounced as in these two counties, where the dramatic postwar demographic shift set the stage for a major legislative preoccupation of the 1950s and 1960s: agricultural land conservation.

ORCHARDS TO INDUSTRY

Agricultural pockets survive, even if agriculture does not thrive as it once did, in the Bay Area and Los Angeles conurbations. Overall, California is still the nation's top agricultural producer, but in the postwar years, the state's economy became much more diverse. In the process, much of Santa Clara County was sacrificed to new, Cold War-generated industry. A combination of factors attracted industry to the valley after World War II: federal government-sponsored research in electronics, nearby urban markets, abundant and inexpensive land available for large plant operations, and cities and developers willing to underwrite the cost of infrastructures.

During the early 1950s, however, a small group of Santa Clara County growers and county planners watched industrialization and urban growth with a mixture of disbelief and anger, particularly since many of the valley's former caretakers were now among its chief despoilers and often considered protestations as attacks on "progress." To this concerned group, Santa Clara's fallen orchards presaged ruination: bulldozers were fashioning an example of rural California's future. The urgency of the situation prompted planners and growers to act swiftly and with determination. Despite, or perhaps because of, the urgency, they experimented with fresh but promising planning ideas in hopes of balancing urban growth with farmland conservation.

The shopping centers, rows of nearly identical houses, and industrial plants contrasted starkly with the valley's prewar beauty. Orchard growing in the Santa Clara Valley dates from the Spanish and Mexican periods when fruits and vegetables were grown, mostly on mission lands, for local consumption. Commercial orchards, however, came with the Gold Rush, as enterprising migrants took advantage of fertile soils, a temperate climate, and hungry gold-seekers to cultivate a profitable local fresh produce market. By the mid-1860s, growers were actually producing more than the local market could handle, inasmuch as the market area was geographically restricted by mountains to the east.

Commercial agriculture might have subsided with the Gold Rush except that the transcontinental railroad, completed in 1869, allowed growers to exploit eastern markets as well as new markets opening in the West. The port of San Francisco continued to handle a sizable tonnage of grain shipments, which railroad cars now sped to the docks; but after 1869, the port was also in competition with railroads for long-distance shipments. In the 1870s, local entrepreneurs developed the first commercial fruit drying and canning operations; this, combined with newly available rail transportation, further encouraged growers to expand production because they could ship preserved fruit quickly to points east. During the same decade farmers planting vineyards, grain fields, and vegetable crops began to push cattle ranchers toward the foothills; and by 1880 the commercial fruit and vegetable industry had forced out the grain industry as well. From 1870 on, growers worked assiduously to make the valley produce copious quantities of peaches, prune plums, plums, apricots,

cherries, walnuts, grapes, and a multitude of vegetables. By the turn of the twentieth century, nearly 100,000 acres of orchards covered the valley floor, which was neatly parceled into farms ranging from ten to one hundred acres in size.⁵

By 1920, orchard farming was so intensive that irrigators had irreversibly depleted the fresh water artesian basin beneath them, and the valley floor had begun to sink. The fertile soil and temperate climate nevertheless induced growers to remain, and the arrival of canneries encouraged continued expansion. In 1907, Libby, McNeil, and Libby shipped its first seasonal “pack” — four hundred tons of canned apricots and cherries. Later, Del Monte and Sunsweet opened operations in the valley; and in the early 1920s these three food-processing firms established the valley as a major cannery, fully compatible with the fruit, nut, and vegetable crops for which the area was now well known. Local trucking companies supplied fresh produce to a regional market; and two railroads, Southern Pacific and Western Pacific, carried fresh, canned, and later frozen produce throughout the United States. Between 1920 and 1940 this powerful, small-farm produce industry continued to expand, aided by Amadeo Giannini’s financing innovation: the branch bank. Statewide banking operations made it possible for the San Francisco–based Bank of Italy to offset possible losses in one agricultural sector or geographic region with potential profits in other sectors or regions. Diversifying risks allowed the bank to underwrite agricultural expansion without fear of extensive bank losses. Over 200 food-processing firms located in the valley between 1920 and 1940. In that same period, a water conservation program was established. In 1926, the Santa Clara Valley Water Conservation District began to promote and design a system of reservoirs that would store winter flood water to replace diminishing groundwater supplies; and in 1934 voters approved a bond issue that allowed construction to begin on

⁵ Lawrence Kinnard, *History of the Greater San Francisco Bay Region*, v. 2 (New York and West Palm Beach: Lewis Historical Publishing Co., 1966), 330–356; Gerald D. Nash, *State Government and Economic Development: A History of Administrative Policies, 1849–1933* (Berkeley: University of California Institute of Governmental Studies, 1964), 213–224; David W. Salmon, “The Metropolitan Area of Santa Clara County, California” (M.A. thesis, Stanford University, 1946), 37–47.

the first of six reservoirs that would sustain the agriculture fueling the valley's economy.⁶

By 1940, Santa Clara Valley was fully covered with modest-sized farms and small towns arrayed around the urban hub of San Jose. The county was among the most agriculturally productive in the entire United States. Agriculture and related industry accounted for over 90 percent of the county's employment; less than 8 percent of the workforce was employed by nonagricultural manufacturing firms. Nestled between the Santa Cruz Mountains and the Diablo Range, the county enjoyed a Mediterranean climate that made it, as the Chamber of Commerce advertised, the "Valley of the Heart's Delight."⁷

Industrial growth sparked postwar migration to the Bay Area. In Santa Clara County, as well as in the entire nine-county area, industrialization was the result of prewar federal defense planning, postwar industrial decentralization, and, to a lesser extent, Chamber of Commerce promotional efforts. In the 1930s, the federal government undertook the construction of several military installations to form a secondary ring of defense around the existing installations at the mouth of the San Francisco Bay. This secondary ring was located along the perimeter of the bay, and northern Santa Clara County was chosen as one of the sites. Between 1931 and 1933, the federal government spent about \$5 million to build Moffett Field. First known as Sunnyvale Air Station, it was originally intended for use by the Navy as the West Coast base for dirigible transport operations, although the Navy abandoned its plans for a transport fleet after the Akron and the Macon, its first airships, crashed in 1933 and 1935 mishaps.

Bay Area businessmen worked hard to bring this federal project to Santa Clara County. In 1928, the San Jose Chamber of Commerce initiated

⁶ Kinnard, *loc cit.*; *Population Census*, 1910, 1920; U.S. Bureau of the Census, *City and County Data book*, 1949; Jeanette Befame, "Anniversary for Libby, Growth Cited," *San Jose Mercury* [hereinafter cited as *SJM*], August 29, 1957, 21; Carey McWilliams, *California: The Great Exception* (New York: Current Books, Inc., 1949), 230–232; Seonaid McArthur, ed., *Water in the Santa Clara Valley: A History* (San Jose: De Anza College, California History Center, Local History Studies, v. 27, 1981), 21–41.

⁷ Santa Clara County Planning Department [hereinafter cited as SCCo Plan Dept], *Land Use Issues in Santa Clara County*, December 1963, n.p.; not only did the Chamber of Commerce use this slogan in its publications, but the chamber's letterhead bore this motto as well.

a fundraising effort to purchase land for the proposed air station. With assistance from the San Francisco Chamber of Commerce and the City of San Mateo, it eventually raised \$360,000 to secure the land it needed to persuade the Navy to build an installation at the southern tip of the bay. As the depression of the 1930s deepened, few citizens questioned the wisdom of courting a federal construction project which would inject \$5 million into the local economy.⁸

Military installations made the Bay Area attractive to industry, and World War II further demonstrated how military installations stimulated research and development operations. In 1940 the National Advisory Committee on Aeronautics began constructing Ames Research Laboratory near Moffett Field. The federal government, moreover, induced academic scientists into wartime service, and nearby Stanford University joined a handful of elite universities throughout the country in developing sophisticated electronic equipment for national defense purposes. Local industry also profited from the war effort. For example, Food Machinery and Chemical Corporation (FMC), the county's leading manufacturer of agricultural and food-processing machinery, also produced amphibious tanks during the war years. In 1951, FMC shifted its manufacturing emphasis when it procured a multimillion-dollar contract to build tanks for the Army. By 1956, nearly half of FMC's workforce was employed in the company's new ordnance division.⁹

The presence of a military base, defense-oriented research facilities, proximity to urban markets, and abundant land suitable for development made Santa Clara County attractive to new and expanding industries in the postwar years. In 1948, International Business Machines (IBM) established a card-printing plant in San Jose to serve its electronic calculators,

⁸ City of San Jose, *Your Government: The 1940 Municipal Report of San Jose, California* (San Jose, 1940), 32; Bob Crabbe, "Huge Moffett Field 20 Years Old — And Still Growing," *SJM*, April 12, 1953; "Old Timers Turn Back the Valley's Clock," *SJM*, June 13, 1956; Mel Scott, *The San Francisco Bay Area: A Metropolis in Perspective* (Berkeley: University of California Press, 1959), 221.

⁹ City of San Jose, *Your Government: The 1940 Municipal Report* (San Jose, 1940), 32, and *Your City Government, 1941-1942-1943* (San Jose, 1943), 6; "FM&C Plans Additional \$25,000 Expansion," *SJM*, January 31, 1951; "Work Swift on Ordnance Plant Here," *SJM*, April 7, 1951; County of Santa Clara, *1956 Bonds*, February 14, 1956 (voter pamphlet).

introduced in the same year. Also in 1948, Russell and Sigurd Varian, inventors of the klystron tube, founded Varian Associates, which in a few years was manufacturing more than eighty types of microwave tubes plus a variety of other electronic devices for use in the chemical, geophysical, and communications fields.¹⁰ Wartime prosperity, moreover, prompted the San Jose Chamber of Commerce to join the ranks of business organizations that sought to keep the postwar economy from foundering once defense industries shut down. In 1943, the chamber established committees to encourage industrial growth and plan for housing. The following year the chamber persuaded the San Jose City Council and the Santa Clara County Board of Supervisors to budget a total of \$35,000 to launch an ambitious advertising program. In 1950, the chamber boasted that over fifty new industries had entered the valley since 1944; by 1954, another 124 firms had joined them.¹¹

The industrial firms that appeared in the 1940s did not unduly disrupt the county's predominantly rural character. And even though growth was rapid by previous standards, most residents were generally satisfied with the steady integration of industry and agriculture during the 1940s. Their tandem strength was seen as a way to prevent the economic hardships experienced during the 1930s from recurring. Few imagined that industry would impair, let alone replace, agriculture. Industrial Survey Associates (ISA), a San Francisco-based consulting firm, prepared an economic survey for the San Jose Chamber of Commerce in 1948. In its report, the firm predicted that "agriculture w[ould] continue to be a major factor in the local economy" although it expected orchard production "to decline slowly in favor of more truck farming, dairying, and other operations" which would cater to a growing urban market for fresh produce. ISA furthermore predicted, inaccurately, that the population influx had peaked in the 1940s, and that the rate of growth would be much less during the 1950s.¹²

¹⁰ "IBM: Campus-Like Plant," *SJM*, January 19, 1958; "Big Spurt Shown by Varian," *SJM*, January 19, 1958.

¹¹ *SJM*, June 13, 1956; "Growth — A Statistical Picture" in *1956 Bonds*, n.p.; S.A. Miller, "San Jose Chamber of Commerce," in Bertha M. Rice, *The Builders of Our Valley* (San Jose, 1957), 111–112.

¹² Industrial Survey Associates, "San Jose and Santa Clara County: An Economic Survey with Particular Reference to Industrial Growth" (report prepared for the San Jose Chamber of Commerce and presented May 1948), 49–50, 53, 55–56.

The turning point for industrial growth in Santa Clara County came in February, 1953, when Ford Motor Company announced that it would relocate its Richmond, California, assembly plant to a 150-acre site near Milpitas, a small community northeast of San Jose. The plant was estimated to cost more than \$40 million and employ about 4,000 workers. The San Jose Chamber of Commerce quickly claimed to have played a major behind-the-scenes role in persuading Ford to relocate in the valley rather than in one of several other California sites also under consideration. A spokesperson divulged that the chamber had “been aware of the company’s interest in the San Jose area for some time, but since any adverse publicity might have jeopardized the company’s decision to move here, we had to deny all rumors.” The spokesperson further revealed that the chamber’s committee in charge of promoting industrial development had “compiled a mass of statistical material for the company through a third party” without bothering to inquire “for whom [the] information was being prepared.” Such dealings were by now commonplace for the chamber: it had “performed the same service in like circumstances in the past.”¹³

The chamber’s boast no doubt overstates its role inasmuch as Ford deliberately chose a site outside San Jose’s city limits and proximate to service from two railroads. Moreover, Western Pacific, from whom Ford purchased the assembly plant site, announced shortly thereafter that it would construct a 500-car switchyard to handle Ford’s rail traffic. Ford’s decision to enter the valley nevertheless was the cue that other firms had been awaiting. In mid-February, San Jose Steel announced that it had purchased a thirty-acre site about a mile south of the proposed Ford plant, where it planned to relocate its expanding operation. Later in the same month, Monsanto Corporation reported that it would move its western headquarters from Seattle to Santa Clara, where it would join a four-year-old plant which had “undergone almost constant expansion.” The latter news particularly concerned planners and many area residents, alerting them to the very real possibility that industrial growth might bring unwanted air pollution.¹⁴

¹³ “\$50 Million Ford Plant for San Jose,” *SJM*, February 4, 1953; “Ford Confirms Buying Site,” *SJM*, February 17, 1953.

¹⁴ “W.P. Will Build 500-Car Switch Yard to Handle Ford Plant’s Rail Traffic,” *SJM*, February 17, 1953; “S.J. Steel Buys Land Near Ford Plant Site,” *SJM*, February 25, 1953; “Monsanto Will Move West Headquarters to Santa Clara,” *SJM*, March 26, 1953; letter

Heady with success, the San Jose Chamber of Commerce launched another promotional campaign in late February, 1953, sending 2,000 selected industries brochures hailing the theme, “If it’s good enough for Ford, it’s good enough for us.” The *San Jose Mercury* and the *San Jose News* assisted the chamber by supplying, cost-free, reprints of their front-page stories announcing the Ford decision. Some valley residents were equally ecstatic, especially landowners in the Milpitas area, where real estate prices jumped from about \$1,250 per acre to almost \$2,000 per acre. One “working stiff,” as he identified himself in a letter to the editor of the *Mercury*, even went so far as to suggest publicly that Milpitas residents should “get on the ball,” for here was “a chance to change the name of ‘Milpitas’ to ‘Ford’ or ‘Fordson.’”¹⁵

Between 1953 and 1955, agricultural production and employment in Santa Clara County plummeted, while employment in the electronic and durable goods manufacturing industries soared. By 1956, three major industrial firms provided the lion’s share of year-round jobs: Ford Motor Company employed about 3,000, Westinghouse Electric Corporation another 3,000, and Food Machinery and Chemical Corporation topped 2,000.¹⁶ Canning and packing companies continued to provide many seasonal jobs, but their importance waned as more and more orchards vanished, replaced by urban places with sentimentally rural names such as Pruneridge Shopping Center, the San Tomas Orchards housing development, or the Blossom Hill Manor subdivision.

Industrial parks, a development concept simultaneously exploited by Stanford University, city governments, and major landowners — especially Southern Pacific — further encouraged industrial growth in the valley during the 1950s.¹⁷ Stanford University, for example, announced in April 1953

to author from Abraam Krushkhov, AICP, January 27, 1983 (Krushkhov served as a senior planner in the county planning department from 1952–1956, during which time he “participated as a planning staff member in all the discussions with Karl Nipper, the WPRR land agent, regarding the selection of Milpitas as the site for the Ford Motor Company plant.”).

¹⁵ “C of C Steps Up Its Drive for Industry,” *SJM*, February 26, 1953; “Board Okays Industrial Area Survey,” *SJM*, March 5, 1953; letter to the editor, *SJM*, February 9, 1953.

¹⁶ *Land Use Issues in Santa Clara County*, 4; *1956 Bonds*, n.p.

¹⁷ Robert W. Travis, “A Study of Industrial Site Development and Site Choice in Santa Clara County, 1950–1959” (mimeographed report, San Jose State University: Real Estate Research Bureau, n.d. but probably early 1960s), especially 13–24. Travis found

that it planned to locate industrial, commercial, and residential developments on 6,000 acres of its vast landholdings. The industrial area was to be situated conveniently adjacent to Southern Pacific lines. The first two occupants in the new Stanford Industrial Park were Varian Associates and Eastman Kodak; later they were joined by Lockheed's research division and many other electronics and nuclear energy research and development firms.¹⁸

Southern Pacific and the City of Sunnyvale cooperated in a similar venture. In the early 1950s, Southern Pacific began trading and buying land to secure contiguous parcels that, by mid-1956, became an industrial park of over 800 acres. During the same time, the City of Sunnyvale annexed parcels in the proposed industrial area, zoned them for industrial use, and used revenue bonds to purchase water and sewer lines. So determined were industrial growth advocates that when, in 1955, the owner of 200 acres in the area presented a request to have the zoning changed from industrial to residential so that he might erect a housing subdivision, the Sunnyvale Chamber of Commerce led a fierce campaign to prevent the change. Sunnyvale's pro-industry faction was rewarded in June 1956, when General Motors acquired title, from Southern Pacific, to nearly 250 acres of land in Sunnyvale's industrial area, where the company sited a new assembly plant. When Lockheed shortly thereafter decided to construct a new guided missile development center in the city's industrial park, growth advocates could hardly contain their joy over the prospects for a land sales boom.¹⁹

By the end of the decade, north Santa Clara County housed many of the leading firms in the research and development as well as the budding micro-electronics industries. In the late 1940s, nearly everyone welcomed industrial growth and corporate expansion, believing they would strengthen the local economy. Because no one foresaw that business and industry would undermine agriculture, no local governmental body was under pressure to establish land-use priorities.

that access to markets and availability of land for construction were the two factors that most influenced firms to locate in Santa Clara County in the 1950s.

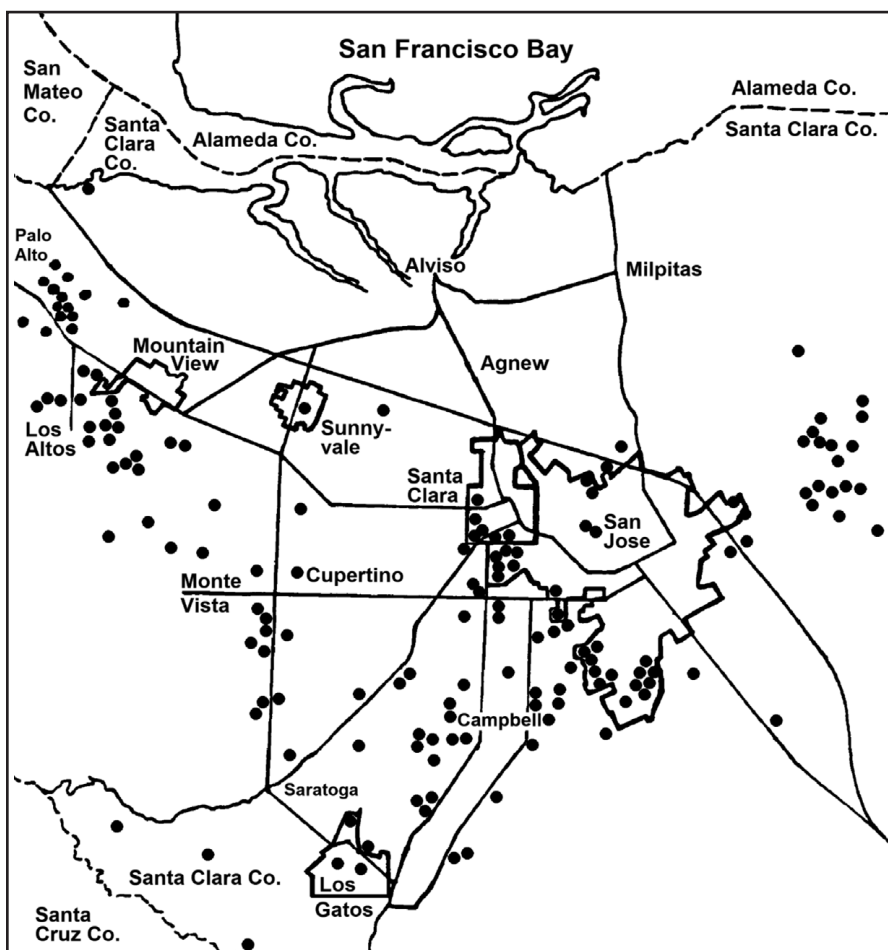
¹⁸ "Planning Firm Retained for Huge Development," *SJM*, April 23, 1953; "Lockheed to Build Big Missile Lab at Stanford," *San Francisco Chronicle*, February 1, 1956.

¹⁹ Glenn Brown, "City-Chamber Planning Nets G.M. Plum," *Daily Palo Alto Times*, March 31, 1956; "Sunnyvale Gets New G.M. Plant; Land Sales Boom," *San Francisco Examiner*, March 31, 1956; "General Motors Completes Sunnyvale Land Purchase," *SJM*, June 23, 1956.

URBAN GROWTH AND MUNICIPAL ANNEXATION RIVALRY

Industrial growth triggered population growth, and a vigorous real estate market emerged. In the nine months between April 1950 and January 1951, about 20,000 new residents settled in the county. Forty-five thousand followed during the next two years, and the stream continued uninterrupted. Huge subdivisions of moderately priced, look-alike houses

NEW HOUSING SUBDIVISIONS IN SANTA CLARA COUNTY



Dots indicate housing subdivisions that appeared in Santa Clara County from April 1950 to April 1951. Based on map designed by Santa Clara County Planning Department and published in the *San Jose Mercury*, April 15, 1951.

arose to accommodate this burgeoning urban population (see map, page 127). In the first three months of 1951, for instance, construction began on thirteen subdivisions ranging in size from 90 to 1,200 homes which, when completed, added nearly 7,000 single family dwellings to the existing housing stock. For the most part, these subdivisions were not sited within existing city boundaries, but hither and yon in unincorporated areas.²⁰

Whereas cities annexed land conservatively during the late 1940s to attract industry, the haphazardly placed subdivisions which housed the new workforce incited a municipal scramble for control over outlying residential areas. The Losse Ranch subdivision is an instructive example of what became commonplace. In March 1951, KAR Construction Company announced that it planned to build 500 single family dwellings “at popular prices for veterans and working men” on the 123-acre ranch, which it had just purchased for \$250,000. The parcel formerly belonged to what once had been among the largest fruit ranches in the valley — 446 acres of apricot, cherry, prune, and peach orchards originally purchased by Henry E. Losse in the 1880s. One-third of the original ranch, divided among Losse’s three children when he died, was sold to developers. KAR Construction ran into some difficulty, however, because the 123-acre ranch was three-quarters of a mile from the nearest city boundary. In order to avoid incurring unwanted costs for providing municipal services to the area, KAR sought to have the ranch annexed to the City of Sunnyvale. California law required that annexed land be contiguous with prevailing city boundaries, but Sunnyvale city officials realized that 500 lots of appreciating property would considerably enhance the city’s tax base. The city therefore agreed to undertake negotiations with the owners along a 200-acre strip of what City Manager H.K. Hunter termed “intervening property,” invoking the Uninhabited Territories Annexation Act to expedite these negotiations. This act, a heretofore little-used 1939 law, allowed cities to annex any contiguous territory in which fewer

²⁰ “County’s Population now 308,900 — Gain of 6.9%,” *SJM*, January 10, 1951; Norman Bowman, “Boom ’52 Promises Even Better for ’53,” *SJM*, January 1, 1953; Jeannette Befame, “Subdivision Homes Mushroom in County,” *SJM*, April 15, 1951.

than twelve registered voters lived if two-thirds of the landowners agreed to the annexation.²¹

Similarly, when San Jose wanted to annex land south of the city for future industrial expansion in late 1952, it also invoked the Uninhabited Territories Annexation Act and drew boundaries around approximately 440 acres in such a way as to exclude over seventy registered voters. It then further divided the land into two proposed annexation parcels, known as Monterey Parks One and Two, so that only six registered voters resided in one and only eight in the other, thus avoiding a vote of the affected residents.²²

Although Sunnyvale gained a justified reputation as an aggressive city, annexation rivalry was particularly keen between the cities of San Jose and Santa Clara. Whereas San Jose annexed land only fourteen times and Santa Clara only three times between their respective dates of incorporation and 1945, the situation began to change in 1946. In that year San Jose annexed four tracts, another five in 1947, seven in 1949, and ten in 1950, for a four-year total of thirty-two annexations. From 1946 through 1950, Santa Clara annexed only four tracts, but in 1951 the city suddenly annexed six tracts, then another nine in 1952, thereby adding over 500 acres to the city in two years. In the same two-year period, San Jose annexed another sixteen parcels totaling over 1,000 acres.²³

Some have attributed the genesis of annexation rivalry to one city official, A.P. Hamann, San Jose city manager, who gained local notoriety for quipping that San Jose would become the “Los Angeles of the North.” Hamann’s flagrant boosterism made him an easy target for the local media, but many city officials willingly, if self-defensively, played annexation one-upmanship. San Jose, however, eventually earned the dubious distinction of being called a “misplanned city,” based on evidence

²¹ “\$5,000,000 Subdivision Deal for Sunnyvale Area Revealed,” *SJM*, March 2, 1951; “300-Acre Area May Be Added to Sunnyvale,” *SJM*, April 7, 1951; *California Statutes and Amendments to the Code* [hereafter cited as *California Statutes*], 1939, Chapter 297.

²² “Four-Hour Hearing Bares Battle Lines” *SJM*, January 24, 1953.

²³ Annexation data compiled by Carlos Robert Cavanagh in “Urban Expansion and Physical Planning in San Jose, California: A Case Study” (M.A. thesis, University of California, Berkeley, 1953), 75–79; see also Keith Kaldenbach, “The ‘Topsy,’ and How They Grew,” *SJM*, February 6, 1955, Magazine section.

that city officials consciously allowed growth “to take place not where inhabitants as a whole wanted it, nor where reason dictated, but rather wherever developers chose.”²⁴

Developers chose to build wherever plentiful land could be purchased inexpensively, and, until mid-1953, there were no legal restrictions on the choice of location. Cities, in turn, vied with one another to annex revenue-producing residential, commercial, or industrial areas. During 1953 hardly a day passed that the local press did not report on the anarchic situation, often describing the fray in militaristic terms by likening proposed annexations to “encircling movements” or “pincers.” In March, 1953, San Jose’s assistant city attorney resigned “because of differences with his superiors over the city’s annexation program,” which included any sort of annexation bid not specifically prohibited by law.²⁵ The city attorney, whose legal acumen repeatedly helped San Jose to prevail in court, admitted that rivalry had led to “a fantastic series of conquests under the guise of annexations.”²⁶

Intercity warfare peaked and then subsided quickly in 1953, after Santa Clara County Assemblyman Bruce F. Allen introduced state legislation to replace the ineffectual County Boundaries Commission with a new annexation commission operating under guidelines designed to restore order to urban growth.²⁷ The Santa Clara County Planning Department and Planning Commission, moreover, began to take an increasingly active interest in annexation bids that threatened valuable orchard land. Cities suddenly realized that their squabbling had attracted outside attention which might have unwanted consequences.

²⁴ Stanford Environmental Law Society, “San Jose: Sprawling City. A Report on Land Use Policies and Practices in San Jose, California” (Stanford: Stanford Law School, March 1971), 16–28.

²⁵ “Rendler Out; Quits Over Annexations,” *SJM*, March 18, 1953. See also “Two Eastside Districts Drop Suit Against San Jose Annexation,” *SJM*, May 28, 1953 and “The Southern Annexations: Four-Hour Hearing Bares Battle Lines,” *SJM*, January 24, 1953.

²⁶ As quoted in Cavanagh, “Urban Expansion and Physical Planning in San Jose,” 40.

²⁷ Wes Peyton, “Strip Annexations Would Be Outlawed by Allen’s Measure,” *SJM*, January 18, 1953. The *Mercury* followed the progress of this and several other annexation bills Allen introduced in 1953, and the one bill that finally passed pertained only to rural school districts which might be included in municipal annexation proposals.

In the 1950s, the county's demographics shifted quickly in favor of urban or urbanizing areas, while the reins of county government remained in the hands of a decreasing rural, farm population. By 1958, three of the five supervisorial districts contained only 24 percent of the county's population. The more densely settled areas of western San Jose, Palo Alto, Mountain View, Los Altos, Los Gatos, Saratoga, Sunnyvale, and Almaden housed three-quarters of the county's residents, who were now represented by a minority of two on the county Board of Supervisors. Anticipating the emerging disproportionate representation on the board, cities banded together in mid-1954 to create the Inter-City Council (ICC) thinking that they "could achieve more if they went to the county government with a unified position," presumably meaning that they could prevent the county from interfering with municipal annexation plans. As a body that had only advisory powers and depended upon voluntary participation, the ICC never served as a "vehicle to answer area problems," as some of its members originally hoped it would. Nevertheless, the council created a forum that allowed city officials to declare a truce which eased intercity annexation rivalry.²⁸

THE RURAL BACKLASH: EXCLUSIVE AGRICULTURAL ZONING

In 1951, county officials declined to become embroiled in annexation issues because to do so would have interfered in municipal politics.²⁹ By 1953, however, aggressive municipal expansion had generated more than intercity rivalry; city officials had angered many local orchard specialists by encouraging so-called leapfrog urban growth and thereby enticing other growers to sell land for urban development. Fruit growers were particularly concerned because orchard crops require a long-term investment: new orchards do not immediately produce commercially profitable quantities.

²⁸ This information is taken from David Robert Armstrong's excellent case study of the Inter-City Council, which was done twelve years after the council's formation; Armstrong, "The Inter-City Council: An Experiment in Intergovernmental Cooperation in Santa Clara County" (M.A. thesis, San Jose State University, 1966), especially 52–53, 73–74, 89, and 94–99.

²⁹ "County, Palo Alto Planners Confer," *SJM*, January 18, 1951.

Escalating rural land values pushed up farm property tax assessments, which threatened to undermine the modest, but relatively stable profit margin on which growers operated.

Growers who did not want to sell their land were not, however, of one mind about how best to protect farmland vis-à-vis urban encroachment. In February, 1953, the Santa Clara County Farm Bureau challenged the County Planning Commission when the latter proposed an interim zoning plan for the unzoned eastern side of the county. The interim zone was intended to give county planning staff time to prepare a master plan with precise zoning recommendations based on a special land-use study the commission had just authorized. Farm Bureau president Wilton A. Stine criticized the need to zone, even on an interim basis, such a large area when “emergency situations” (i.e., conflicts arising from land-use decisions adversely affecting a limited number of agricultural landowners) were localized. He further charged that the proposal was “an attempt on the part of planners to place unwanted restrictions on property.”³⁰

Santa Clara County nonetheless inaugurated the farmland conservation movement in California on April 8, 1951, when the County Planning Commission proposed to amend the zoning ordinance and establish an exclusive agricultural zoning classification. This action came in response to an appeal presented by fifteen pear growers near Agnew, a small community located northeast of Santa Clara City. Planning Commissioner Will Weston was also one of the petitioners. Weston expressed hope that the Farm Bureau would support the proposed amendment, but the group declined to take a position at that time.³¹ The farm group did, however, establish a task force in mid-1954 to study the threat of urban expansion to the county’s agricultural industry as a whole, and the organization later went on record as supporting agricultural land protection. Nevertheless, Raymond C. Benech, one-time president of the Santa Clara County Farm Bureau and a former planning commissioner, claims that the group’s

³⁰ Santa Clara County Planning Commission [hereinafter cited as SCCo Plan Comm], *Minutes*, v. 8, 172, 211; “Farm Bureau Turns Cool Eye on Interim Zoning,” *SJM*, February 19, 1953.

³¹ SCCo Plan Comm, *Minutes*, v. 8, 254–255; “County Plan Board Asks Curb on Farm Land ‘Dwindling,’” *SJM*, June 18, 1953.

support only “meant that the Farm Bureau wanted land to be gobbled up very slowly so that farmers could get a higher price for their orchards.”³²

In the early 1950s, agricultural landowners clearly were divided over the issue of agricultural zoning, but there was no prolonged public debate that would define group interests. Eliciting no formal opposition to the proposed exclusive agricultural zoning amendment other than the cool Farm Bureau response, the Planning Commission formally requested the Board of Supervisors to approve the amendment. The board duly granted its approval. The ordinance created an exclusive agricultural zone classification that prohibited “uses which would destroy the value of certain areas for agricultural purposes.” Appropriate agricultural uses, however, were broadly defined in the ordinance to include nurseries, botanical conservatories, arboreta, riding academies, stables, fur farms, and guest ranches. Technically, therefore, the ordinance could be used to cover many land uses pursued by part-time or avocational farmers. The measure’s broad applicability and implementation based on voluntary inclusion no doubt explain, in part, why the measure was not opposed more vigorously. In April, 1954, the Planning Commission created the county’s first greenbelt: 744 acres of pear orchards near Agnew in the hands of fifteen owners (the same fifteen petitioners) whose orchards ranged in size from twelve to 240 acres.³³

A closer look at the record reveals that a handful of committed individuals actually created the exclusive agricultural zoning ordinance. Will Weston was indisputably the catalyst. As early as 1951 he enlisted the aid of County Planning Director Nestor Barrett and County Zoning Administrator John Haas to create a special zoning district that would protect the pear orchards in the Agnew area from residential subdivisions. When Karl Belser succeeded Nestor Barrett in May 1952, he imbued the nascent idea with a philosophy of planning which was strongly influenced by programs

³² Carroll K. Hurd, “Where Do Farmers Go From Here?,” *SJM*, February 6, 1955, Magazine section; author interview with Raymond C. Benech, July 14, 1982, San Jose (At the time, Benech owned an orchard ranch located on the southern outskirts of San Jose, with apricots and pears as the principal crops. He served as president of the Santa Clara County Farm Bureau from 1959 to 1971, and as a Santa Clara County planning commissioner from 1970–1982.).

³³ SSCo Plan Comm, *Minutes*, v. 9, 47, 55, 85, 85A–B, 86; “Santa Clara ‘Green Belt’ Plan Votes,” *San Francisco Examiner*, April 8, 1954.

of the 1930s National Resources Planning Board and which resembled the original garden city concepts of Ebenezer Howard.³⁴

In 1953, Belser prepared a “sphere of influence” study in which he set forth a plan for “an agricultural greenbelt [that] would divide cities to keep them separate so they could keep their identities.” Belser first “map[ped] out the best soils in the county, and these became the areas he was primarily concerned with.” This map detailed areas best suited for watershed, swampland, mountain open space, orchards and farms, light- and high-density residential, commercial, industrial, and public and semi-public uses. Belser’s ultimate goal was twofold: to “preserve agricultural land” and, at the same time, “lend definition to the urban areas.” City officials, however, were openly critical of his plan, which they quite accurately perceived as the first step toward delimiting annexable areas and thereby controlling urban expansion.³⁵

In late 1953, Belser assigned Abraam Krushkhov, a senior planner in the department, to meet with the Agnew pear growers. Krushkhov’s resulting map outlined the first proposed exclusive agricultural zoning district in the county, formally designated such after the zoning ordinance was adopted in early 1954. Belser’s “sphere of influence” plan and Krushkhov’s exclusive agricultural district planning map set the spirit and procedure for all county planning work that followed.³⁶ Comprehensive planning maps for any particular planning area would block out in a general way the sub-areas best suited for residential, commercial, industrial, and agricultural uses, thus avoiding the political overtones of the 1953 “sphere of influence” study. Then the planning staff would work with agricultural landowners

³⁴ Letter to author from Abraam Krushkhov, December 14, 1982. In his major work, *To-Morrow: A Peaceful path to Real Reform* (1898), Ebenezer Howard proposed that England’s urban blight be remedied by building “new towns” or “garden cities” in the open countryside and then protecting them from cities and from one another by surrounding the “new towns” with agricultural greens.

³⁵ Krushkhov letter, December 14, 1982; author interview with Roy Cameron on July 13, 1982, at Saratoga, California (Cameron came to the Santa Clara County Planning Department as a senior planner in 1954. He moved up to associate planner in 1956 and then to director in 1967 when Karl Belser resigned. Cameron retired from his position and the department in 1979).

³⁶ Krushkhov letter, December 14, 1982.

who wanted zoning protection, and together they would draw up detailed maps for exclusive agricultural district designation.

Without question, exclusive agricultural zoning in Santa Clara County resulted from the collaborative efforts of Will Weston and Karl Belser. Weston, born in Oakland in 1884, lived his entire life in the Bay Area. In 1913, after graduating with a B.A. in economics from the University of California, Berkeley, he purchased his first pear orchard in Santa Clara County. Over the years he expanded his operation until, at one time, he owned and leased about 275 acres, known as Peraleda Ranch, which produced eight varieties of canning and shipping pears. Weston was not only a successful grower; he also was active in community affairs and local politics. He held memberships in several agricultural and grower organizations, both the Santa Clara City and the California State Chambers of Commerce, and the Commonwealth Club of California. An original appointee to the Santa Clara County Planning Commission, he was also a member of the San Francisco Bay Area Council during the late 1940s and early 1950s. His commercial orchard business, situated in a rapidly growing area, allowed him to witness firsthand the urban threat to agriculture; and his civic affiliations, especially with the Commonwealth Club and the San Francisco Bay Area Council, brought him into contact with then-current ideas and debates regarding land-use planning.³⁷ However the seed for agricultural zoning was planted, Weston's familiarity with zoning laws and procedures quickly convinced him that such tools could be used to farmers' advantage. He noted that zoning was used to keep residences from encroaching on industrial areas, and he "couldn't see why agricultural zoning shouldn't keep residences out too." Weston, in due time, proposed the idea to Karl Belser who, in turn, "took it up as a sort of prophet."³⁸

Belser, unlike Weston, had no long-standing personal ties to the area and no apparent interest in agricultural land protection before coming to the Santa Clara County Planning Department in 1951. He graduated from the University of Michigan School of Architecture in 1925 and received

³⁷ Letter to author from Nancy Perrin Weston, daughter of the late Will Weston, November 11, 1982; *National Cyclopedia of American Biography* 57 (1977): 420.

³⁸ Robert Burgess, "Originator of Greenbelting in SC County to Retire," *Daily Palo Alto Times*, May 1, 1959; Ronald Buel, "The Changing Land: Some Farmers Strive to Curb Urbanization, Not Sell to Developers," *Wall Street Journal*, October 13, 1966.

his Master of Architecture degree from the Harvard School of Design in 1927. After a short interval working in Boston as an architect, he accepted a teaching post in 1929 at the newly formed School of Architecture and Engineering at Virginia Polytechnic Institute (VPI), where he remained until 1941. In the mid-1930s, his interest began to drift toward planning, and in 1936 he took a sabbatical from VPI to study planning and the housing movement in Europe at the University of Zurich. He completed his studies by taking an extensive tour through Austria, Germany, the Scandinavian countries, Belgium, Holland, France, and England, visiting several so-called new towns in England. After resigning his position at VPI in 1941, Belser adopted planning as a second career, and throughout the 1940s he held several positions: in 1942, he accepted a position as a planner for the City of Detroit; in 1944, he became a planner for the City of Los Angeles; during 1945, he was a member of the University of Oregon Bureau of Municipal Research; and, in 1946, he went back to teaching at the University of Oregon School of Architecture. In 1951, he took a sabbatical from the University of Oregon to accept a position as senior planner with the Santa Clara Planning Department. When he became department director in 1952, he left his teaching career forever. Belser remained director of the Planning Department until he resigned in December 1966 to become deputy director of a United Nations special housing development project.³⁹

Thus, it appears that Belser's ideas regarding agricultural land protection did not come so much from theory as from an inventive mind enhanced by years of study and experience in both architecture and planning. His ideas were, as a colleague has phrased it, "a spontaneous, creative response to a real-life situation — where we could all see the county and city governments permitting the thoughtless destruction of prime agricultural land on almost a daily basis."⁴⁰

The exclusive agricultural zoning ordinance may have been the brainchild of a few well-placed individuals, but it would have died quietly if other agricultural landowners had not requested zoning protection under its provisions. It may be helpful, therefore, to determine which farmers welcomed and which opposed exclusive agricultural zoning. Statistical evidence indicates that from

³⁹ Letter to author from Wilma Belser, wife of the late Karl Belser, November 27, 1982.

⁴⁰ Krushkhov letter, December 14, 1982.

1948 through 1954, the orchards most likely to be converted to urban uses were those planted in apricots and prunes. Not coincidentally, these crops also generated the lowest income during those seven years. Orchard crops with a higher rate of return, namely pears and cherries, tended to remain in production. Aging pear and cherry orchards also were more likely to be replanted, while older apricot and prune orchards tended to be sold as the end of their bearing lives approached. Farm size also appears to have influenced farmers' decisions to sell, since farms that ranged in size from ten to twenty-nine acres "tended to be displaced first." Thus, smaller-acreage landowners, particularly those who had planted orchards of apricots and prunes, could not generally afford to continue farming once property taxes began to rise.⁴¹

Ray Benech similarly recalls that "the people who sold out the fastest were the real, true farmers," that is to say, "the small farmer who had twenty acres and worked it all himself." Small farmers in Santa Clara County, Benech explains, "sold out for \$1,500 an acre here, and they went up to Yuba City and they bought for \$500 an acre. They got three acres for one, and they ran like hell because their orchards were getting old."⁴²

Census data on Santa Clara County farm size in relation to farm income generally support Benech's perception (see Table 4). There are no relevant data prior to 1954, but the figures for 1954 to 1964 show that the percentage of part-time and low-income-producing commercial farms to the total number of farms (column D) remained fairly constant throughout the decade. If one looks more closely at these figures, however, the decrease in the total number of farms from 4,953, in 1954, to 2,631, in 1964, represents a 46 percent drop, and the decrease in the total number of commercial farms from 3,875 to 1,888 represents a 51 percent drop, while the decrease in the number of low-income-producing commercial farms from 699 to 210 represents a 70 percent drop. Moreover, during the same time, the low-income-producing commercial farms, as a percentage of all commercial farms, fell substantially from 18 percent in 1954 to 8 percent in 1959.⁴³ Clearly, then, farmers struggling to

⁴¹ Jack Lessinger, "The Determination of Land Use in Rural-Urban Transition Areas: A Case Study in Northern Santa Clara Valley, California" (Ph.D. dissertation, University of California, Berkeley, 1956), 168-171, 189, 206-208, 211-221.

⁴² Benech interview.

⁴³ The rise to 11.1 percent in 1964 is likely attributable to a change in the way the Bureau of the Census defined commercial farms in 1964.

make ends meet were abandoning farming in Santa Clara County at a higher rate than others.⁴⁴

TABLE 4. FARM SIZE IN RELATION TO VALUE OF AGRICULTURAL PRODUCTS SOLD SANTA CLARA COUNTY, 1945–1964

(A)		Commercial Farms (B)		(C)	(D)
Year	Total Number	Total Number	Low Income (LI)	Part-time Farms (PT)	LI & PT Farms as a % of (A)
1945	5,914	4,307	—	(1380)	(23.0)
1950	5,282	3,888	—	—	—
1954	2,953	3,875	699	580	25.8
1959	3,354	2,421	197	673	26.0
1964	2,631	1,888	210	490	26.6

(A) A farm has been variously defined by the Bureau of the Census. Generally speaking, however, a farm is defined as land in parcels of three or more acres on which some agricultural operation is performed. The value of farm products must equal or exceed some nominal dollar amount: \$150 in 1950 and 1954, \$250 in 1959 and 1964.

(B) A commercial farm also has been variously defined. The major difference between a farm and a commercial farm is the value of products: in 1945, \$1,000 or more; in 1949, 1954, and 1959, \$1,200 or more; and in 1964, \$2,500 or more. A low-income-producing commercial farm is one on which the value of products is less but constitutes the major source of income, where the operator works fewer than 100 days off the farm.

(C) Part-time farms constituted a new category in 1954. Generally speaking, a part-time farm is defined as one where the operator works 100 days or more off the farm and whose nonfarm income is greater than the value of farm products.

The 1945 figure in parentheses is the number of farms where the operator simply worked off the farm for 100 days or more — a category abandoned after that year. The number of part-time farmers would be fewer than 1,380, but the percentage figure (23.0) suggests that it fairly represents the number of part-time and low-income commercial farms in 1945.

Source: U.S. Bureau of the Census, County and City Data Book, 1949, 1952, 1956, 1962, 1967.

⁴⁴ How many and which of these farmers were selling farmland in Santa Clara County and buying farmland elsewhere is impossible to determine.

Some might view as ideal a lifestyle that meant a job in the city with a home in the country. Economically speaking, however, those living in this manner were living on the margin. Ray Benech might remember them as the “true farmers,” but even he admits, “[y]ou could never make a good living off a small acreage. In the ’thirties and ’forties everybody who had twenty acres or less had another job.” When land values began to climb in the early 1950s, smaller owner-operators therefore began to sell in order to improve their financial status, leaving their counterparts in an even more precarious situation. If their orchards were older, they were forced either to follow their predecessors and sell out at the first good opportunity or divert their aging orchards into crops that would supply a quick return on investment. Berries and flowers filled the gap, for both were in demand by a nearby growing urban market. Statistics of land-use conversion in the county reveal that, in the five years from 1949 to 1954, the number of acres in orchards of all types decreased by 15,561, vineyards by 2,249 acres, and vegetable crops by 7,971 acres. During the same five years, however, the number of acres planted in berries actually increased by 1,304 acres, field crops other than vegetables by 6,930, and nursery stock by 565 acres.⁴⁵

If those people who really wanted to farm were leaving the area, then who stayed behind to fight for agricultural land preservation and why? According to Benech, those farmers most in favor of agricultural zoning in the 1950s were “the larger landholders, the people that were a little more wealthy and could afford to keep their land.” The fact that these people “held out,” however, “didn’t make them more pristine farmers,” as some non-farmer land conservation advocates have portrayed them. “It’s just that they were financially able to hold onto their land, and they could see the value of the land.”⁴⁶

Without question, the greatest number of acres (79,864) placed under exclusive agricultural zoning during the 1950s was in the hands of very large landowners, although most of these larger parcels were zoned for exclusive agricultural use in 1956 or later.⁴⁷ However, almost half of the farm operators who

⁴⁵ Benech interview; George Goodrich Mader, “Planning for Agriculture in Urbanizing Areas: A Case Study of Santa Clara County, California” (M.C.P. thesis, University of California, Berkeley, 1956), 73.

⁴⁶ Benech interview.

⁴⁷ Robert W. Travis, “The Use of Greenbelt Theory in Santa Clara County” (San Jose State University: Real Estate Research Bureau, April 30, 1962), 24.

requested exclusive agricultural zoning from April 1954 to June 1961 owned 100 or fewer acres (see Table 5). Of the 3,856 acres in actual or proposed greenbelts by 1956, two years after the ordinance took effect, 1,756 acres were planted in pear or cherry orchards; only 210 acres were planted in apricot or prune orchards. The other 1,900 acres were, for the most part, devoted to poultry ranching.⁴⁸

TABLE 5. NUMBER AND PERCENT OF ZONING ACTIONS AND ACREAGE ZONED FOR EXCLUSIVE AGRICULTURAL USE BY SIZE OF AREA ZONED PER ACTION, SANTA CLARA COUNTY, APRIL 1950 – JUNE 1961

Number of Acres per Zoning Action	Zoning Actions		Acreage Zoned	
	Number	Percent	Number	Percent
Fewer than 10	26	15.66	148	0.16
10–19	23	13.86	307	0.32
20–49	28	16.87	906	0.95
50–99	16	9.64	1,185	1.24
100–249	31	18.67	4,841	5.06
250–499	13	7.83	4,662	4.87
500–999	8	4.82	4,693	4.91
1000 and over	18	12.65	78,864	82.49
Total	166	100.00	95,606	100.00

Compiled by Robert W. Travis, "The Use of Greenbelt Theory in Santa Clara County," (San Jose State University: Real Estate Research Bureau, April 30, 1962), 24.

Nevertheless, in a county where the average farm was less than 150 acres, and many were much smaller than that, a large farm, in locally relative terms, was not necessarily vast. Will Weston was, according to local criteria, among the larger landholders. In 1945, the average farm size was 123 acres, a figure that held fairly constant until 1959, when the average farm size jumped to 158 acres. The sudden rise corresponds, moreover, to

⁴⁸ Mader, 76.

a decrease in the number of small farms. In 1954 there were 4,953 farms in the county; by 1959, there were only 3,345, a decrease of 1,608 farms. Of those 1,608 farms lost, 583 were farms of ten or fewer acres.⁴⁹ If the county had remained predominantly rural during the 1950s, one would attribute this decrease in numbers and increase in average size to farm consolidation. Given the circumstances, however, the increased average size is more plausibly the result of fewer ten-acre farms to figure into the average.

The evidence suggests that growers, especially pear and cherry growers, who enjoyed a favorable market for their crops in the 1950s, sought to protect their land and agricultural investments. These were, in addition, farmers with land located closer to expanding urban areas. They were, for all intents and purposes, urban landowners. It seems quite natural, then, that they turned to an urban land-use tool, zoning, to protect their investments. In so doing, they were acting no differently from other urban landowners who sought to protect the value of their residential, commercial, or industrial properties with zoning to exclude incompatible land uses. Later, after state legislation upheld the county's exclusive agricultural zoning ordinance, and other state legislation proposed to couple agricultural zoning with preferential tax assessment, owners of much larger farms and ranches situated farther from the urban fringe began to petition the planning commission for inclusion in exclusive agricultural districts. At the outset, however, exclusive agricultural zoning appealed primarily to agricultural landowners with modest but profitable operations, who saw its chief benefit to be a means of preventing municipal growth from engulfing their farms and orchards.

GREEN GOLD: PLANNING FOR AGRICULTURAL LAND PRESERVATION

The chance collaboration between Weston and Belser is remarkable, considering that in 1950 the Santa Clara County Planning Commission was, like most county planning commissions, a moribund institution. Established in 1929, the commission carried a mandate "to make and adopt subject to the provision of law, a master plan for the physical development of

⁴⁹ Bureau of the Census, *City and County Data Book*, 1949, 1952, 1956, 1962, 1967.

the county.”⁵⁰ The master plan, however, did not emerge until the 1950s, and it was developed principally under Karl Belser’s directorship. In the 1930s and 1940s the planning commission did little more than pass broad zoning ordinances, rubberstamp requests for zoning variances, and sponsor an annual barbeque attended by local businessmen and politicians. Will Weston himself once summed up the early days of the planning commission by stating that. “There were days when we’d get through the business in half an hour, and Oscar [Campbell, another commissioner] would get out his movie projector and give us a film show.”⁵¹ The Santa Clara Valley Water Conservation District, also established in 1929, undertook all study and planning for water development and conservation in the county during the 1930s and 1940s. And the San Jose Chamber of Commerce took the lead in planning for industrial development in the 1940s. In fact, when Industrial Survey Associates made its economic survey for the San Jose Chamber of Commerce in the late 1940s, it sought assistance not from the county planning commission or planning department, but from the state planning office.⁵²

A quasi-public committee attempted to inaugurate comprehensive planning in the 1940s, but county planners took no part in their activities. The Citizens’ Planning Council of Greater San Jose was created in 1942 when a local clergyman, Stephen C. Peabody, proposed to the San Jose Coordinating Committee — a five-member group comprising the city manager, the superintendent of schools, the community chest executive, the probation officer, and the chairperson of the city recreation committee — that “a self-survey of the many functions and activities taking place in San Jose” be undertaken so as to “draw a picture of the possible future life of this community, especially its economic outlook.” Peabody’s proposal led the coordinating committee to create an organization for the purpose of carrying out this community self-study. Under the executive directorship of planner Mel Scott and a volunteer lay and professional

⁵⁰ Copy of 1929 ordinance in SCCo Plan Dept, Data and Information: Administration, Boards and Commission.

⁵¹ Burgess, *Daily Palo Alto Times*, May 1, 1959.

⁵² California History Center, *Water in the Santa Clara Valley*, passim; “San Jose and Santa Clara County: An Industrial Survey,” see front cover and letter of transmittal.

staff, the Citizens' Planning Council conducted, from 1943 to mid-1945, studies of family welfare, juvenile delinquency, neighborhood planning, public health and medical care, off-street parking, library services, historic landmarks, community education, race relations, county government, and agriculture. *Foresight*, a bimonthly publication highlighting the council's work, circulated throughout the state as well as the local area.⁵³

As the council's name implied, its research focused on the City of San Jose; however, several studies covered the entire county. This was particularly true of the agriculture study, which "brought together for the first time much valuable information on farm holdings and conservation problems" to form the data base for a countywide soil conservation plan. The agriculture committee report is interesting for two additional reasons: first, the committee, reporting in 1945, foresaw the land-use conversion about to take place in the north county and predicted accurately that "a considerable amount will be subdivided into small residential type holdings." But the committee, like Industrial Survey Associates, inaccurately predicted that residential development would not impair agriculture. The committee even suggested the construction of "a scenic drive through the mountains surrounding the valley . . . and an annual blossom festival" to celebrate the valley's springtime beauty.⁵⁴

During the 1930s and 1940s, county planning officials simply did very little planning. This is not to imply that Santa Clara County was unusual; few county planning commissions actively engaged in planning until the 1950s. While the record is sketchy, it nevertheless suggests a commission and department prepared to follow rather than monitor or challenge city growth, react to rather than plan for urban development. This continued to be the commission's general point of view through the 1950s. Roy Cameron, who joined the department in 1954 and served as its director from 1967 to 1979, states, "The county never at any time wanted to get into the development business. . . . They didn't look upon themselves as a competitor with cities in terms of zoning land." Until the late 1950s, planning commissioners served indefinite terms at the discretion of the Board of

⁵³ Citizens' Planning Council of Greater San Jose, "A Statement of the Origin of the Planning Council of Greater San Jose" (mimeographed report, San Jose, 1946), n.p.

⁵⁴ *Ibid.*, see "Summary Report of the Committee on Agriculture" contained therein, n.p.

Supervisors, which displayed no tendency to appoint new commissioners at regular intervals. As a result, two of the original commissioners, Will Weston and W.W. Curtner, both ranchers, served terms of almost thirty years. Longevity gave them control of the commission, and the commission catered to agricultural interests throughout the 1950s.⁵⁵

It is difficult to ascertain precisely why the commission took such a lackadaisical approach to planning in the 1930s and 1940s, but an excerpt from a letter that Weston wrote to fellow commissioner Oscar Campbell in 1948 provides a clue. In response to a San Francisco Bay Area Council proposal to include Santa Clara County in the San Francisco metropolitan area for 1950 census purposes, Weston responded negatively, writing to Campbell that Santa Clara County was “sufficiently hinterland to have a provincial center.”⁵⁶ He thus voiced a fear common among local government officials: that planning meant, for outlying areas, accommodating the needs and desires of the City of San Francisco. One can only assume that Santa Clara County commissioners considered their local responsibilities to be administrative in nature, implementing state planning law insofar as they were able or inclined to do. Planning was an activity largely centered in urban areas where there was a perceived need to plan for housing, transportation, or sanitation; and county officials felt obliged to remain informed about city, or regional, planning only so that they were not surprised by unanticipated events.

When Karl Belser assumed charge of the Planning Department in 1952, he hired a staff whose achievements gained the department nationwide recognition. William H. Whyte, for instance, considered the department’s efforts to establish exclusive agricultural zoning as well as its plans for a continuous chain of creekside parks to be among the best examples of open space planning in the United States.⁵⁷ Belser, in addition, maintained a constant outreach program, speaking on behalf of regional and state planning at state and national professional meetings, testifying at

⁵⁵ Cameron Interview; SCCo Plan Dept, Data and Information: Boards and Commission—Planning Commission, Memberships, 1930–1964.

⁵⁶ Letter dated April 29, 1948, from Will Weston to Oscar Campbell, SCCo Plan Dept, Improvement and Development: San Francisco Bay Area Council.

⁵⁷ Letter dated January 29, 1968, from William H. Whyte to Roy Cameron, SCCo Plan Dept, Improvement and Development: Conservation, Open Space.

state legislative hearings, and occasionally writing articles on land use and agricultural land preservation in Santa Clara County. In the 1940s, the department produced only one planning study (of county sewage and industrial waste disposal sites), but between 1953 and 1960, the year the county general plan was adopted, Belser and his staff undertook nearly thirty planning studies, surveys, or analyses.⁵⁸

Comprehensive plans that included recommendations for agricultural land protection were based on a philosophy, developed by Belser, which equated the best farmland with natural resources protected by national forests and parks. Fertile agricultural land should be conserved and used wisely to meet future food needs. *Green Gold*, a 1958 departmental publication, most clearly expressed his philosophy. It advocated that the federal government or the individual states create “permanent agricultural reserves” to protect “priceless resource[s]” from “suburban scatteration” which threatened in many areas “to become endless, monotonous megalopolis.”⁵⁹ This philosophy harkened back to the New Deal, when the federal government purchased over eleven million acres of privately owned, marginally productive land and placed its management in the hands of various federal and state agencies. It also echoed the tenets of the 1920s Regional Planning Association of America as well as Howard’s turn-of-the-century garden city concept.

However, the Santa Clara County greenbelt plans developed under Belser’s direction also represented a practicable response to contemporary problems. They reveal that, as far as agricultural land was concerned, county planners were willing to sacrifice northern and western areas to industrialization and urban growth. Planners concentrated their efforts to protect agricultural land in the southern and eastern areas of the county. These were much less densely settled areas where they had some chance of educating the public about the benefits of planning before urban growth

⁵⁸ Information gathered from a lengthy examination of the holdings in the SCCo Plan Dept library, July 1982.

⁵⁹ SCCo Plan Dept, *Green Gold*, 1958, n.p. Krushkhov notes (January 27, 1983) that when he was on the planning staff (1952–1956), “Leland Wilcox (deceased) — a friend of Karl Belser’s from Oregon — wrote nearly every planning report in the office and gave faithful expression to Belser’s philosophy and ideas.”

created chaos and a sensitive political climate that would render comprehensive planning impossible.

In June 1956, the department presented the Eastside Interim General Plan with the hope that its implementation would conserve twenty-three miles of the best agricultural land on the valley floor by dispersing some of the expected population increase to thirty-three square miles of foothill land in the Diablo Range. Since the area was already under an interim zoning ordinance, and because a 1955 land-use study indicated that soil conditions, crop yields, and farmer attitudes made exclusive agricultural zoning feasible for an extensive area, planners had reason to be optimistic. The plan appeared to forestall municipal annexation into the area for several years, but only because San Jose was expanding west and north during the 1950s. When San Jose began, in the 1960s, to seek more land to the east for urban uses, farmers on the Eastside began to sell out.⁶⁰ By the early 1980s, the twenty-three square miles recommended for intensive agricultural use in 1956 had either been developed or was vacant, awaiting development.

The natural landscape gave planners even greater cause to be optimistic about guiding development and preserving agricultural tracts in the area known locally as South County, which is geographically separated from the North County by a narrowing of the valley floor. County planners consequently spent much time and energy developing a plan that would concentrate commercial, industrial, and residential growth around existing governmental centers. These, in turn, were to be separated and surrounded by wide swaths of agricultural and recreational greenbelts, intended both to maintain a critical mass of land for sustaining the agricultural industry and to lend autonomy and identity to area towns.⁶¹ South County municipal officials initially reacted favorably to the plan, which Clarence S. Stein, a founding member of the Regional Planning Association, praised as both “practical” and “imaginative” because it proposed a

⁶⁰ SCCo Plan Dept, *Eastside Interim General Plan*, June, 1956, n.p.; Robert N. Young, “Feasibility of Conservation of Agricultural Land in the Berryessa Area” (report to Planning Department), October 6, 1955; Cameron interview.

⁶¹ SCCo Plan Dept, *Roadside Towns Become a Greenbelt City: A Preliminary Plan for South Santa Clara County*, 1957; Planning Research Associates in cooperation with the Planning Department, “South Santa Clara County: A Physical and Economic Survey,” December 15, 1957.

“new type” of greenbelt concept: a “constellation” of urban centers “united as part of a regional complex,” integrated into the existing agricultural landscape and economy rather than “separate towns protected by a green surrounding open area.”⁶²

Hoping to avoid the political repercussions of the 1953 “sphere of influence” study, the County Planning Department courted voluntary cooperation from South County residents. To persuade landowners as well as government officials to embrace the “greenbelt city” idea, as it was called, the Planning Department made fifteen presentations of the plan as it evolved. From January through October 1957, Belser and/or his staff appeared before civic organizations, city councils, town hall meetings, and farm groups in an effort to foster understanding of and support for their development guidelines. By November 1957, they achieved some measure of success when the city councils of Gilroy and Morgan Hill approved the preliminary plan. In addition, the Santa Clara County Farm Bureau and “certain agriculturalists in the Gilroy–Morgan Hill area” appeared in support of the preliminary plan at the second public hearing, held in December 1957.⁶³

Downtown business people were happy to support the plan because it would continue to channel commercial development toward established municipal centers. Likewise, civic organizations generally supported the plan because sufficient land was targeted for industrial and residential growth. But residents already settled in the unincorporated areas of the South County quickly dashed planners’ hopes for implementation. At issue was an area proposed for agricultural use, known as the Machado Greenbelt, near the town of Morgan Hill. Several owners of small parcels in the proposed greenbelt requested that their properties be excluded. When the preliminary plan was unveiled in 1957, however, the parcels were shown as included in the greenbelt. This provoked an angry response from twenty-seven property owners who reiterated their earlier protest at the December

⁶² Letter dated October 5, 1957, from Clarence S. Stein, FAIA, to Karl Belser, SCCO Plan Dept, Improvement and Development: Planning, South County Study.

⁶³ Memorandum on “South County Plan—Chronology of Events,” dated December 18, 1957, from Robert N. Young, associate planner, to Karl Belser, and Minutes of December 4, 1957, public hearing, both SCCO Plan Dept, Improvement and Development: Planning, South County General Plan.

1957 public hearing and petitioned the county planning commission to have their properties excluded. The commission ignored their petition and adopted the plan as it appeared in its preliminary form; and the Board of Supervisors voted unanimously to adopt the plan in January 1958.⁶⁴ Outraged, the heretofore informally organized property owners adopted the name “South El Camino Development Association,” and membership grew to thirty-three. A written protest from the association asserted that its members were “entitled to commercial development along South El Camino Real [aka Monterey Highway] just as the El Camino Real enjoyed in North County when it developed.” The association further charged that the town of Morgan Hill had “absolutely no right, or power, to speak for us who live and operate in the unincorporated area,” and it vowed that it would “fight to collect just compensation for any move which deprives us of our rights as taxpayers, citizens, and property owners.”⁶⁵

The confrontation between would-be land speculators and county planners augured the fate of South County greenbelt planning and revealed, moreover, the complex situation that generally thwarted planning for balanced growth. The Santa Clara County Planning Commission and the Board of Supervisors were willing to provide exclusive agricultural zoning for landowners who desired such protection, but the planning commission steadfastly viewed its role in farmland conservation matters as strictly advisory. Therefore, even though Belser and his staff took the initiative to design areawide plans based on an overarching concept of using agricultural preserves to achieve balanced growth and to maintain a diversified local economy, the Planning Department’s official function was only to provide expert advice. Planners’ professional qualifications lent authority to the guidelines the department mapped out; and Belser, acting on personal conviction, also became the chief political advocate for greenbelt planning. Implementation, however, depended completely on cooperation from city officials with considerable support from local citizens. State law

⁶⁴ Minutes of December 4, 1957, public hearing; Petition dated October 21, 1957, to Santa Clara County Planning Commission, both SCCo Plan Dept, Improvement and Development; Planning, South Santa Clara General Plan.

⁶⁵ Petition dated August 9, 1959, from South El Camino Development Association to Santa Clara County Planning Department, SCCo Plan Dept, Improvement and Development; Planning, South Santa Clara County General Plan.

gave county supervisors the authority to frame land-use plans for unincorporated areas, but state law did not correspondingly require municipalities to recognize those plans. It is not surprising, given these circumstances, that the South County plan met the same fate as the Eastside plan. By the mid-1980s, South County open land was almost entirely in the hands of developers or speculators.

The Santa Clara County story might never have echoed in the legislative chambers of the State Capitol if county planners and a handful of growers had relied on citizens' good will to accomplish the task of preserving agricultural land. At the same time the county's exclusive agricultural zoning ordinance was drafted, however, plans were also laid for a state legislative effort. Roy Cameron explains that since "there was no political body that had the ability to control growth then," the only alternative "was to go to the state legislature." During 1954, the Planning Department devoted considerable time and effort to prepare for the State Assembly a report on the status of city and county planning in California. The report spotlighted the problems and proposed solutions for several areas of the state where urban growth had created planning chaos.⁶⁶

Karl Belser also worked with Ken Wilhelm, executive secretary for the Santa Clara Farm Bureau, to devise a legislative plan. Bruce F. Allen recalls that Wilhelm suggested to him that a state law be written to require cities to obtain owner consent to annex land zoned for exclusive agricultural use. Allen introduced, during the 1953 session, a number of bills designed in some way "to curb hostile annexations," but his first bills "were defeated by opposition of the League of California Cities." In 1955, however, he introduced the bill that became known as the Greenbelt Act, one of over sixty annexation-related bills proposed during the legislative session. The original bill would have restricted cities throughout the state from annexing lands zoned for exclusive agricultural use, but amendments made in the Assembly allowed implementation only in those counties that had, as of December 31, 1954, adopted master land-use plans that included an

⁶⁶ Cameron interview; California, Assembly, Interim Committee on Conservation, Planning, and Public Works, *Planning for Growth: A Report on the Status of City and County Planning in California*, January 1955.

exclusive agricultural zone classification. An additional amendment provided the bill would expire in two years.⁶⁷

Although the bill encountered local opposition from the City of San Jose and the *Mercury*, Allen says that he received “unanticipated help from legislators from metropolitan areas” representing constituents who “simply desired the niceties of open space preservation.” This unexpected support from urban areas got the bill through the Assembly, though not unamended; and it easily passed through the rural-dominated Senate. A series of favorable front-page articles in the *San Francisco Examiner*, moreover, aroused public attention and helped to create sufficient popular support for Governor Goodwin Knight to sign the bill. By 1957, the Santa Clara County Farm Bureau was fully behind the Greenbelt Act and lobbied for its extension. Cameron recalls that the 1955 law was “the number one piece of legislation that Karl, Ken Wilhelm, and other members of the Farm Bureau, pushed.”⁶⁸

The 1955 Greenbelt Act marked the point at which agricultural land conservation achieved legislative recognition as an issue of statewide importance; but once the battle for agricultural zoning reached the state level, the fragile planner–farmer coalition, which existed on the county level, fell apart. Those who preferred to define the American Dream as a suburban

⁶⁷ Reference to a “task force” report prepared by Wilhelm and Belser appears in Will Stevens, “Unofficial Figures Indicate Loss of State’s Farming Area to New Housing Subdivisions,” *San Francisco Examiner*, May 23, 1955, reprinted in *Examiner* leaflet entitled *The Big Push*; letter to author from Judge Bruce F. Allen, dated August 19, 1982; *California Statutes*, 1955, Chapter 1712; Governor’s Chaptered Bill File, Chapter 1712, 1955 (California State Archives), indicates that Governor Goodwin J. Knight received letters concerning Allen’s bill (AB 2166) from the State Board of Equalization, the State Department of Public Works, the County Board of Supervisors Association, the League of California Cities, the State Bar of California, the State Chamber of Commerce, Mather Agricultural Council, as well as from assessors, tax collectors, and taxpayer groups. The letters, however, are not in the file, nor does file notation indicate which groups supported and which opposed the bill. The expurgated record can only be offered as evidence that the bill had strong opponents and supporters, as former Assemblyman Allen has stated.

⁶⁸ Stevens, *The Big Push*; Allen letter; copy of resolution dated November 2, 1956, from Wilton Stine, Santa Clara County Farm Bureau, to California Farm Bureau Federation in California, Assembly, Interim Committee Reports, 1955–1957, *State Greenbelt Legislation and the Problem of Urban Encroachment in California Agriculture* 13, no. 14 (May 1957): 45–50; Cameron interview.

tract home or a franchise operation in a strip shopping mall were formidable opponents once they found implicit allies in those who preferred to define a farm in terms of retirement income, or its potential for capital gains. Both contingents flatly rejected the vision of the future — urban centers surrounded by agricultural greens — proffered in the Eastside and South County plans. Many valley residents came to consider the Planning Department's greatest achievement to be the transportation network it designed in the 1950s, a maze of expressways connecting the North County traffic concatenation to the state and intercontinental freeways that criss-cross the county. It is perverse irony that, in the mid-1970s, Marriott's Great America, the Bay Area equivalent of Disneyland, occupied land that Will Weston once planted in pear orchards.

The tenuous Santa Clara County coalition nonetheless led the fight to preserve agricultural land and rural community identities by coupling greenbelt theory with planners' chief tool, zoning. Once the land conservation issue reached Sacramento, they held the "Valley of the Heart's Delight" aloft as an example of what lay ahead for rural California. As Karl Belser stated before an Assembly subcommittee meeting in San Jose in November, 1956: "Our county is but a microcosm of the State."⁶⁹ Santa Clara Valley's name was to be invoked many times during the next decade as state legislators struggled to devise a program of agricultural land conservation that was acceptable to both rural and urban interests.

Ultimately the state-level debate shifted from planning for urban growth balanced against agricultural concerns to issues of property taxation. Closer examination of that shift reveals, however, that the 1955 Greenbelt Act challenged a long-standing but legally vague tradition of home rule in California. From roughly the turn of the twentieth century, a loose home rule principle had shaped a state-local alliance which gave local governments powers and responsibilities that ultimately brought counties and cities into conflict. State-sanctioned land-use regulations in rural areas touched a sensitive political nerve: if agricultural land needed to be conserved (many doubted that it did), who should have control and through what legal channels should controls be manifest?

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⁶⁹ California, Assembly, *State Greenbelt Legislation*, 30.

Chapter 2

THE GENESIS OF HOME RULE IN CALIFORNIA

“Home rule” in its simplest explanation refers to a delegation of authority granted to local governments by a state, either through its constitution or by legislative action. The bundle of powers varies from state to state (and not all states grant home rule), but the range covers all the structural, functional, fiscal, and personnel aspects of government operations. Historically speaking, however, the term “home rule” has no distinct meaning in American governmental theory. The turn-of-the-century political phenomenon known as the home rule movement is associated with other progressive reactions to Gilded Age politics. Broadly conceived, home rule usually entailed passing state constitutional amendments designed to break the political influence wielded by industrial giants and other corporate interests, to rid the halls of city and state governments of corrupt politicians, or to reduce the volume of state legislation pertaining to purely local matters. Particular circumstances in individual states and cities shaped a variety of municipal reform responses which constituted the home rule movement. No specific agenda guided adherents: “To some . . . it was never more than a slogan. To others it was an avenue of escape from the power of some particular political

ring.” For still others, “it offered greater flexibility in local governmental organization.”¹

California is among the forty or so states that are considered to be home rule states. The California State Legislature of the late nineteenth century easily qualified as one of the more corrupt. Much has been written about the political power of the so-called Big Four, but, as George Mowry has noted, “Every Huntington, Crocker, Hopkins, and Stanford had hundreds of purchasable smaller counterparts in editors, jurists, legislators, and city councilmen.”² California’s progressive reformers had plenty to tackle. The constitutional genesis of home rule in California is clear, but the specific circumstances precipitating as well as shaping its reform mode bear closer examination.

Until 1879, the California Legislature set boundaries and granted powers to individual counties and cities by special acts. In 1850, the Legislature created the state’s original twenty-seven counties; but between 1851 and 1874, it passed numerous acts that created more than twenty new counties, some of which were never organized, and shifted countless boundaries. Provisions of the 1879 state Constitution were meant to halt the proliferation of special legislation for local government, although it took an amendment (1893) to accomplish the intent. The new Constitution required the Legislature “to establish a system of county government which was to be uniform throughout the state.” Provisions covering larger cities and combined city-county governments (the latter pertained to San Francisco only), however, specified that such corporate entities could frame municipal charters “consistent with and subject to the Constitution” for their own government. Once approved by the Legislature, charters assumed the force of organic law.³

During the 1890s, a series of lawsuits prompted California courts to begin delimiting, in ad hoc fashion, freeholders’ charter powers that were

¹ John D. McGoldrick, *Law and Practice of Municipal Home Rule, 1916–1933* (1933; New York: AMS Press, 1967), 3.

² George E. Mowry, *The California Progressives* (Berkeley: University of California Press, 1951), 12.

³ *California Constitution*, 1879, article XI; UCLA Bureau of Governmental Research, *County Government in California* (Sacramento: County Supervisors Association, ca. 1951), 3–9. A special act of 1856 merged the San Francisco City and County governments; see Theodore H. Hittell, *History of California*, v. 3 (San Francisco: N.J. Stone and Co., 1898), 650–656.

only implied in the 1879 Constitution. As a result, an 1896 constitutional amendment specified for the first time certain functions constituting municipal affairs. It provided chartered governments with the authority to set the qualifications for, establish terms of office for, and generally regulate local courts and judges, police commissions, election boards, and boards of education.⁴ The courts and the Legislature were further to define the sphere of local government during the twentieth century, and the direction that process took was partly influenced by land and tax problems that remained unresolved during the nineteenth century.

THE GENERAL PROPERTY TAX

Tax provisions written into the 1849 Constitution determined that tax administration would be carried out by local governments even though the revenue would be used to finance the state government. These provisions resulted from negotiations between northern and southern politicians to ensure that Northern California mining districts generated taxes in proportion to Southern California cattle ranching areas. Delegates to the constitutional convention agreed in principle that taxation should be “equal and uniform throughout the state,” and that all property should be taxed “in proportion to its value, to be ascertained as directed by law.” Tax assessment and collection, however, were placed in the hands of city and county governments. The latter provision satisfied southern delegates, who believed it would prevent Northern California political dominance in state fiscal matters. The provision also ensured, however, that political expediency on the local level, not state revenue needs, would ultimately govern the central matters of taxation. The perceived necessity for compromise led convention delegates to ignore the inherent problem: how to achieve equitable taxation statewide while vesting control over assessment and collection with local governments. The 1849 Constitution, furthermore, made no provision for a central body to monitor taxation, and local political interests thwarted

⁴ Howard Lee McBain, *The Law and the Practice of Municipal Home Rule* (New York: Columbia University Press, 1916), 222–252; *California Constitution*, article XI, section 8 1/2.

the state's best efforts to carry out the equal-and-uniform mandate throughout the nineteenth century.⁵

The 1850 General Property Tax Law enacted to implement the constitutional provisions described real and personal property subject to taxation, established procedures for assessment, and introduced a host of tax exemptions. Realty was defined as "all lands within the state, and all buildings or other things erected on or affixed to the same." Personalty was defined to include household items; all water vessels; money and interest; and public stock in turnpikes, bridges, insurance companies, and monied corporations. Despite the inclusive definition of real property and despite the equal-and-uniform constitutional clause, the same law nonetheless exempted considerable property from taxation. The Legislature granted most of these exemptions to educational, charitable, or scientific institutions, and to state and federal lands. Such exemptions were eminently justifiable, but the inherent legal contradiction opened the door to other claims for exemption. Realty and personalty, moreover, were to be assessed at their "true money value" as ascertained, in writing, by owners rather than by impartial assessors. The 1850 law thus compounded problems by allowing property owners, in effect, to determine property value for assessment purposes, although the Legislature did empower county boards of equalization to review assessment figures and raise or lower individual assessments if deemed necessary.⁶

Following enactment of the 1850 General Property Tax Law, various groups pressed for tax exemptions, and eventually the list of tax exempt properties reflected a system that granted preferential treatment arbitrarily. The revenue act of 1861, for instance, exempted property owned and used by the True and Accepted Masons, the Independent Order of Odd Fellows, and the Society of California Pioneers, presumably based on the claim that these were charitable organizations, although the property of other benevolent, fraternal orders was not tax exempt. The exemptions granted to min-

⁵ William C. Fankhauser, *A Financial History of California: Public Revenues, Debts, and Expenditures*, University of California Publications in Economics, 3, no. 2 (Berkeley: University of California Press, 1913): 118–124; Gerald D. Nash, *State Government and Economic Development: A History of Administrative Policies in California, 1849–1933* (Berkeley: University of California Institute of Governmental Studies, 1964), 8–10; John S. Hittell, *The Resources of California*, second edition (San Francisco: A. Roman and Co., 1866), 144.

⁶ *California Statutes*, 1850, 135; Fankhauser, 131–134.

ing claims, however, engendered much criticism. Northern mining counties controlled the Legislature until 1860, and as a result, mining interests succeeded in shifting the burden of property taxation to Southern California counties. Throughout the 1850s, Northern California representatives to the Legislature outnumbered Southern California representatives forty-four to twelve. With their representatives virtually powerless in Sacramento, landowners in Southern California agricultural counties ended up paying twice the taxes of northern mining counties. Mining claims were tax exempt until 1860, when legislators representing both agricultural and commercial interests finally banded together to secure modest amendments requiring that claim improvements be subject to taxation.⁷ Tax exemptions were usually worth the political inconvenience it took to secure them.

Since the Legislature had no mandate to create a central agency to oversee tax assessment procedures, oversight fell to county governments, the boundaries and number of which changed regularly until the mid-1870s. Assessors proceeded to ignore with impunity the constitutional requirement for equal and uniform taxation and simply levied assessments at levels necessary to raise the number of dollars required each year by the state. Between 1850 and 1870, assessment was additionally hampered by unsettled land-grant claims, which left in doubt the actual ownership of many thousands of acres. On the one hand, settlers eager to take advantage of liberal U.S. government land policies often staked their claims near, if not on, lands previously granted to others by the Mexican government, since these tracts covered much of the land most suitable for cultivation in the Sacramento, San Joaquin, and coastal valleys. Land grant claimants, on the other hand, frequently attempted to float their claims over acreage improved by later settlers. Under Mexican procedures, land grant petitioners were required simply to describe with a holographic map the area each desired. Property descriptions contained in land grants, as a result, were imprecise, making it relatively easy for claimants to shift property lines to a certain degree. Three decades of litigation were required to resolve land ownership conflicts. Market values, moreover, were unstable, in part because population was increasing rapidly and in part because the market

⁷ *California Statutes*, 1860, Chapter 369, and 1861, Chapter 301; Robert Glass Cleland, *The Cattle on a Thousand Hills: Southern California, 1850–1870* (San Marino: Huntington Library, 1941), 163–164, 346–349.

was new. Uncertain land ownership and erratic property values therefore created an atmosphere of general and constant confusion that easily led to corruption among tax assessors and collectors, whose only legal responsibility was to raise a given amount of tax revenue each year. The resulting inequities generated mounting criticism throughout the 1860s.⁸

The favoritism shown railroad companies generated additional dissatisfaction with state tax policies. County assessors, some charged, consistently undervalued railroad lands. In addition, the state sanctioned subsidies for railroad construction. An act of 1859 allowed counties to issue bonds to purchase stock in or grant direct subsidies to railroads. Twenty-four such bonds were issued during the next two decades, totaling more than \$4.5 million; over one-half of the issues were for direct subsidies. Then, in 1864, the Legislature imposed a special tax of eight cents per 100 dollars of taxable property to subsidize construction of the Central Pacific Railroad from Sacramento to the Nevada state line, this in addition to federal government subsidies. In 1865, the state attorney general sought to have the act declared unconstitutional on the grounds that it violated a provision prohibiting the state from loaning its credit to individuals or corporations. The court, however, upheld the law in *People v. Pacheco* (27 Cal. 176), a move that touched off a campaign against state subsidies to railroads.⁹

The spreading land cartel also aroused a host of anxieties among some segments of the populace. Land ownership concentration has often been cited as the chief obstacle to economic development in California during the first decades of statehood, although some historians have advanced arguments that partially revise the image of large landholders as greedy

⁸ W.W. Robinson, *Land in California* (Berkeley: University of California Press, 1948) contains a full account of the land ownership problems that came with statehood. See also Paul W. Gates, "Pre-Henry George Land Warfare in California," *California Historical Society Quarterly* 46 (June 1967): 121-148; Hittell, *Resources*, 453-461; Hittell, *History of California*, v. 3 (San Francisco: N.J. Stone and Co., 1898) also contains a lively account of squatters' riots in Sacramento as well as accounts of Californians who were defrauded of their land grants by unscrupulous lenders and attorneys; see especially 666-690; Arthur Nichols Young, *The Single Tax Movement in the United States* (Princeton: Princeton University Press, 1916), 31-34; and Frank Adams, "The Historical Background of California Agriculture" in Claude Burton Hutchison, ed., *California Agriculture* (Berkeley: University of California Press, 1946), 25, 27.

⁹ Cleland, 387, 410; Fankhauser, 207-211.

speculators. Robert Cleland, for instance, maintains that a chronic lack of capital and usurious interest rates prevented land subdivision and hindered settlement in the southern counties. Arthur N. Young, in contrast, argues that federal government indifference and procrastination, more than landowner greed, prevented a quick resolution of land grant claims, thereby fostering the climate of hostility which kept claimants and settlers in litigious warfare for nearly thirty years. Paul Gates nevertheless estimates that during the 1860s about eight million acres of public land passed into private ownership, enough land for 50,000 farms of 160 acres each. Only 7,008 new farms were established during this decade, however, and of that number, only 2,848 were homesteads. Fully one-half of these eight million acres ended up in the hands of but forty-one individuals and firms, many of whom acquired title to hundreds of thousands of acres each through the use of dummy entrymen and by speculating in land warrants and land scrip. By 1870, regardless of who or what should be held accountable for nineteenth-century land concentration, land monopolization gave people reasonable cause for alarm.¹⁰

Among other problems, large landholdings were often underassessed for tax purposes. Settlers charged that county assessors routinely succumbed to the political and economic influence of large landholders and either omitted from assessment rolls or undervalued vast tracts of land, charges which the first State Board of Equalization later substantiated. Assessors, of course, justified higher assessments on settlers' smaller acreages by noting easily observable improvements in the forms of buildings, livestock, implements, or crops (although growing crops were declared tax exempt by 1854 and 1861 revenue laws). Settlers were not, however, without blame. All too frequently they staked claims that did not respect land-grant

¹⁰ See Cleland, 213–217, and Young, 31–34; Paul W. Gates, “Public Land Disposal in California,” *Agricultural History* 49 (1975): 158–178. Figures compiled by Ezra S. Carr, *The Patrons of Husbandry on the Pacific Coast* (San Francisco: A.L. Bancroft and Co., 1875), 301–303, show that, as of the early 1870s, forty-one individuals or firms controlled about four million acres. Twelve of the forty-one landowners controlled at least two million acres. Two of the largest landowners were James F. Houghton, ex–state surveyor, who eventually acquired title to an estimated 200,000–300,000 acres, and Edward Fitzgerald Beale, ex–U.S. surveyor general, whose acquisition of four Mexican land grants totally 270,000 (which became Tejon Ranch) aroused great suspicion among those critical of state and federal land policies.

boundaries. Settler-made improvements, however, were taxable to the legal owner. Land-grant claimants were therefore obligated to pay taxes on such improvements until the land commission or the courts determined legal ownership, a process that could and often did take years to resolve.¹¹

CALIFORNIA LAND POLICY

Uncountable instances of land-grant floating, bogus-grant fraud, land-scrip speculation, and swamp-land swindling kept the courts busy. They aroused the ire of San Francisco journalist Henry George, who turned his attention to studying the potential long-term economic and social consequences of state politics. In *Our Land and Land Policy*, first published in pamphlet form in 1871, George denounced opportunists who subverted federal and state land policies, sometimes in collusion with government officials to obtain, by deceit or outright fraud, vast tracts of the state's best lands. Immense railroad grants also bothered George, who observed that railroad company owners had found a variety of ways to bankroll the land and get their railways constructed with capital from elsewhere. Retarded land settlement and economic development were the least of the evils resulting from such conditions. Far worse, George believed, were the social consequences of a landed aristocracy supported by a degraded working class. California agriculture already was beginning to resemble the southern plantation system, with grain ranchers employing mostly seasonal laborers who earned meager wages. Other large landholders refused to subdivide and lived exclusively off the rental income generated by tenants. Railroads often withheld their land from market until settler-improved homesteads began to increase the market value of surrounding land. For George, the bitter irony was that government encouraged land monopolization "while prating of the equal rights of the citizen and of the brotherhood of man."¹²

George perceived a host of evils springing from the chaos generated by the land situation. To vent the full force of his wrath against those he believed responsible for this chaos — the federal and state governments,

¹¹ Cleland, 162–163, 166–167; Hittell, *Resources*, 459; *California Statutes* 1854, Chapter 63, and 1861, Chapter 301.

¹² Henry George, *Our Land and Land Policy*, v. 1 of *The Complete Works of Henry George* (1871; New York: Doubleday Page and Co., 1904), especially 36–74, 94–97.

railroad companies, and a handful of large landowners — he idealized settlers as uniformly honest, hardworking individuals (implicitly Anglo-European) seeking only to own a modest farm with which they might raise their standard of living and provide better opportunities for their children. They came West, in other words, seeking the American Dream, which government land policies first offered, then denied them. This uncritical image of settlers contributed to the solution George posed. Public land, he argued, should be given, not sold, in limited quantities to bona fide settlers only. Industrious settlers would develop the land and the economy, thus creating a demand for internal improvements and public institutions, such as agricultural colleges. The state, in turn, could easily finance the cost of physical improvements and public buildings by taxing the value of the land only. Although George was not ready to articulate fully the single tax proposal he espoused in *Progress and Poverty* (1879), he nonetheless argued in *Our Land and Land Policy* that a tax on improvements was a tax on labor and production, an unfair penalty that could only retard land improvement and economic development. The tax penalty should fall on those who allowed land to sit idle. Orderly economic and physical development would proceed naturally if the state would abolish all taxes except one, a tax on the source of all other wealth: land.¹³

Our Land and Land Policy stands as a compelling description of California land policies and politics during the 1860s. In another era, it might have summoned forth a host of zealous reformers. However, no groundswell for reform immediately followed its publication, and the pamphlet sold scarcely 1,000 copies.¹⁴ Those eventually most receptive to George's ideas were those who stood to benefit most: propertyless urban workers who would be freed of the burden of taxation. During the 1870s, they became his chief audience. Nevertheless, a few farmers were attracted to his ideas, especially those who belonged to the California Grange, which worked to change the state's tax system during the 1870s. Other farmers who might have embraced George's proposal balked, however, at the idea of paying taxes while those who did not own land paid none.

¹³ George, 98–124.

¹⁴ See Charles Albrow Barker, *Henry George* (New York: Oxford University Press, 1955), 146, 148.

AGRARIAN REFORM POLITICS

While George was working out his single tax theory in hopes of seeing it used as an instrument of tax reform that would eliminate a complex set of land problems, public attention focused much more narrowly on tax assessment problems. By the late 1860s, widespread tax assessment abuses were so notorious that they could no longer be ignored. Governor H.H. Haight thus persuaded the Legislature to establish the first Board of Equalization in 1870. The board immediately launched a vigorous investigation of county assessment practices. It found that realty was assessed at rates which varied from 33 to 80 percent of full cash value and, further, that “no general rule governed the Assessors in the valuation of either real or personal property.” “Marked inequality,” in the board’s estimation, resulted from “failure . . . to assess land at its full value,” from “assessing large tracts at a much less rate per acre than small ones,” and from “permitting considerable amounts of land to escape assessment altogether.”¹⁵

Those individuals who benefited most from the state’s loose land distribution system, however, worked through the courts to eliminate the Board of Equalization. They succeeded in 1874, when the California Supreme Court, in *Houghton et al. v. Austin* ruled that the board, in ascertaining amounts to be collected and fixing tax rates, was acting in a legislative capacity and was, hence, unconstitutional. The board continued to exist as an advisory agency, but its power to effect change dissipated after 1874.¹⁶

The 1870s were economically and politically turbulent years, and farmers as well as urban laborers increasingly expressed dissatisfaction with the tax system. Wild speculation in mining stock from 1872 to 1875 sent the market soaring. Then, in one month, February 1875, the market collapsed, and the business economy immediately entered a decline, thus signaling California’s belated entry into the national depression initiated by the Panic of 1873. In August 1875, the Bank of California, then the largest monetary institution on the West Coast, closed its doors. Other businesses failed, and unemployment ran high. Severe drought in the winter of 1876–1877 adversely affected the agricultural economy as well.¹⁷

¹⁵ *California Statutes*, 1870, Chapter 489; and State Board of Equalization, *Report for the Years 1872 and 1873* (Sacramento, 1873), 4–7.

¹⁶ Fankhauser, 238–241.

¹⁷ Fankhauser, 228–229, 256–257; Nash, 163.

TABLE 6. STATE PROPERTY TAX VALUES, RATES, AND RECEIPTS, 1860–1900

Year	Valuation of Property (millions rounded)	State Property Tax Rate	State Portion Property Tax Receipts	State Railroad Property Tax Receipts	Total State Property Tax Receipts
1860	\$ 148,194	0.600	\$ 668,801	*	\$ 668,801
61	147,812	0.600	727,880	*	727,880
62	160,369	0.770	686,564	*	686,564
63	174,105	0.920	878,131	*	878,131
64	180,485	1.250	1,261,938	*	1,261,938
65	183,509	1.150	1,641,831	*	1,641,831
66	200,764	1.130	1,608,078	*	1,608,078
67	212,205	1.130	1,807,694	*	1,807,694
68	237,483	1.000	1,925,239	*	1,925,239
69	260,564	0.970	1,933,222	*	1,933,222
1870	277,538	0.865	2,081,168	*	2,081,168
71	267,868	0.865	1,994,853	*	1,994,853
72	637,233	0.500	2,023,775	*	2,023,775
73	527,200	0.500	2,350,911	*	2,350,911
74	607,232	0.649	2,677,073	*	2,677,073
75	618,083	0.605	3,243,581	*	3,243,581
76	595,073	0.735	2,985,352	*	2,985,352
77	586,953	0.630	3,948,032	*	3,948,032
78	584,578	0.550	3,318,387	*	3,318,387
79	**	**	3,006,474	*	3,006,474
1880	666,183	0.640	3,131,734	*	3,131,734
81	659,522	0.655	3,636,008	*	3,636,008
82	607,462	0.596	3,685,367	*	3,685,367
83	764,764	0.497	3,305,507	*	3,305,507
84	821,079	0.452	3,527,349	\$ 20,206	3,547,555
85	859,512	0.544	3,271,719	16,546	3,547,555
86	816,447	0.560	4,222,198	439,165	4,661,263
87	955,456	0.608	4,064,938	63,421	4,001,516
88	1,107,106	0.504	5,134,103	23,990	5,168,093
89	1,115,014	0.722	5,038,424	218,028	5,256,453

Year	Valuation of Property (millions rounded)	State Property Tax Rate	State Portion Property Tax Receipts	State Railroad Property Tax Receipts	Total State Property Tax Receipts
1890	1,099,773	0.580	7,211,414	292,606	7,504,020
91	1,241,231	0.446	5,793,887	232,934	6,026,821
92	1,275,833	0.434	4,950,096	183,814	5,133,911
93	1,211,572	0.576	4,965,259	187,295	5,152,555
94	1,204,977	0.493	6,568,701	482,550	7,051,252
95	1,132,713	0.685	5,687,388	1,282,325	6,969,713
96	1,263,799	0.429	7,310,749	1,245,751	8,556,500
97	1,087,456	0.510	5,180,781	650,683	5,831,464
98	1,129,474	0.488	5,292,604	758,394	6,050,998
99	1,194,678	0.601	5,150,651	717,864	5,868,515
1900	1,218,228	0.498	6,797,033	846,082	7,643,115
*figures not separated from total					
**no figures available					
Source: Fankhauser, <i>A Financial History of California</i> (Berkeley: University of California Press, 1913), 195, 247, 252, 292, 298, 334, 344.					

Property tax receipts, the principal source of state revenue, increased from \$2,677,073 in 1874 to \$3,243,581 in 1875, then decreased to \$2,985,352 in 1876 (see Table 6). Although taxation was a major issue of the 1875 political campaign, pre-election promises were largely ignored by elected officials from both major parties. Thus, despite an unstable economy, the Legislature increased the property tax rate for the 1876–77 fiscal year; as a result, 1877 property tax receipts rose nearly one million dollars, to \$3,948,032. Tax delinquencies, however, remained high from 1872 through 1876. Delinquent state taxes on real property jumped from \$126,006 in fiscal year 1871–72 to \$270,700 in 1872–73, a jump partly explained as a reaction to State Board of Equalization adjustments. Tax delinquencies on real property dropped during the next two years, but never down to the 1871–72 level: from 1874 to the end of the decade, they fluctuated between about \$192,000 and \$221,000.¹⁸

The Central Pacific Railroad monopoly on market transportation precipitated action among farmers. Disgruntled grain growers in the

¹⁸ Fankhauser, 247–252.

Sacramento area began organizing ad hoc farmers' clubs in 1871; and, in 1872, eleven such clubs banded together as the California Farmers' Union. Their plans to establish marketing cooperatives coincided with the chief objective of the Patrons of Husbandry (Grange), a larger and more powerful nationwide association; hence, the Farmers' Union agreed to dissolve into the Patrons of Husbandry, and the California State Grange was organized in 1873. Between early 1871 and autumn of 1874, 231 subordinate granges were organized with a total membership of 14,910 individual farmers, concentrated in the Northern California counties of Napa, Sonoma, Santa Clara, Sacramento, San Joaquin, Santa Cruz, Sutter, and El Dorado — the state's principal agricultural areas at the time. Los Angeles was the only Southern California county with a substantial membership. In the beginning grain farmers dominated the membership and dictated policies; the earliest activities were those carried over from the Farmers' Union. The California State Grange sponsored marketing agreements and cooperative business ventures designed to force the price of wheat higher as well as reduce production and marketing costs. When these ventures failed, membership dropped significantly; by 1876, membership reached a mere 7,660.¹⁹

Political reform activities, however, fired the enthusiasm of a dwindling membership. Their major goal during the early and mid-1870s was

¹⁹ Carr, 75–86; California State Grange, *Proceedings of Annual Sessions* (first through tenth annual sessions bound together; S.F.: various printers), 1873, 1874, 1875, passim. The Grange was not as strong in California and the West as it was elsewhere in the United States during the nineteenth century. Nevertheless, at its peak, 1874–1875, State Grange members may have accounted for as many as one-fourth of the state's farmers. According to 1870 U.S. census data, California had 27,929 people engaged in agricultural occupations excluding laborers, overseers and stockherders. California Grange *Proceedings* show membership, including men and women, as follows: 1873, 3,168; 1874, 14,910; 1875, 15,193; 1876, 7,660; 1877, 6,761; 1878, 5,467; 1879, 3,262; 1880, 1,276.

Robert L. Tontz, in "Memberships of General Farmers' Organizations, United States, 1874–1960," *Agricultural History* 38 (1964): 154, compiled membership figures from National Grange official records that show lower California membership numbers, perhaps because the national headquarters counted only paid, family memberships. His figures show 7,488 family members in 1875, declining to 5,245 in 1876, and 1,120 in 1877, up to 2,053 in 1880, then down to 1,380 in 1890. If one accepts a conservative 1875 figure of 7,488 and considers that the number of farmers in the state increased to at least 30,000 by 1875, one arrives at a reasonable estimate of Grange strength.

the reduction of railroad fares and freight charges, a goal the Grange shared with the Peoples' Independent Party. Central Pacific's control over the carrying trade also prompted organization of the Peoples' Party, an alliance formed in 1872 to promote agricultural and industrial interests. Both groups pressed for the establishment of maximum rates and other restrictive legislation. Their efforts influenced the Legislature to appoint a railroad commission in 1876, but it was given no authority to determine rates.²⁰

By 1876, Grange efforts to gain some control over market prices and railroad rates had ceased, and membership had declined considerably. Constantly rising property taxes, however, gave the remaining members new cause for concern. In addition, the state's business economy was in recession; crop failures during the next season sent the agricultural economy into decline. California Grange political activities during the late 1870s correspondingly began to focus on equalizing property tax assessments and lowering mortgage interest rates. The list of reform demands drafted at the 1878 annual convention for the 1879 Constitutional Convention included "equal taxation of all farming lands of equal producing capacity, when similarly situated," tax exemption guarantees for growing crops and improvements to land, a graduated income tax, and limitations on state and local government spending and taxing powers. State Granges throughout the country demanded tax reforms during the 1870s, but few were able to translate demands into legislative or constitutional changes. Political corruption tied to nagging land problems may have contributed to the eventual success of the agrarian tax reform movement in California. More important to success, however, was the Grange's willingness to join forces with the Workingmen's Party, Denis Kearny's short-lived but powerful organization of unemployed urban workers. Together, the Grange and the Workingmen's Party wielded influence far beyond the strength of their numbers, enough to convene and control a constitutional convention.²¹

²⁰ Solon J. Buck, *The Granger Movement, 1870–1880* (Cambridge: Harvard University Press, 1913), 197–198.

²¹ California State Grange, *Proceedings, 1877–78*, especially 21–23, 26–27, 43–44, 46, and 1878–79, especially 27–28. See also Clarke A. Chambers, *California Farm Organizations* (Berkeley: University of California Press, 1952), 10–11; Fankhauser, 255–58; Hittell, *Resources*, 422–423; and Buck, 105.

When the convention opened in September 1878, the Grange and the Workingmen's Party immediately formed a majority bloc. Their objectives centered almost exclusively on taxation. It is not surprising, therefore, that the revenue and taxation provisions of the 1879 Constitution differed markedly from those adopted thirty years earlier. First, the delegates rejected the notion that taxation should be equal and uniform. The new Constitution provided that taxation apply uniformly within each class of subjects. The 1879 Constitution also called for both state and county boards of equalization, with the state board empowered to increase or lower the entire assessment rolls of individual counties and, in addition, order counties to raise or lower individual assessments. A third provision of the new Constitution addressed farmland taxation specifically. It required that land and improvements be assessed separately and that both cultivated and uncultivated lands of the same quality and similarly situated be valued accordingly and assessed at the same rate. These provisions were meant to prevent further tax assessment abuses, but Grange and Workingmen delegates also hoped these tax provisions would help to break up large landholdings and induce owners to improve their farm properties. Separate assessment of land and improvements dates to as early as 1852 in scattered California localities, but the farmer-labor coalition added provisions they perceived would penalize land speculators and break up large monopolies.²² These provisions, it would seem, were the result not only of "a generation of land agitation," as one tax historian has phrased it,²³ but of nearly a decade of George's advocacy for using the tax system to break up monopolies and redistribute wealth.²⁴

The new Constitution coincided, in fact, with the appearance of *Progress and Poverty*, Henry George's classic treatise on the single tax, in which he argued for the abolition of all taxes except a tax on the site value of land. Although the constitutional provisions regarding taxation did not represent an attempt to establish the system George advocated in *Progress and Poverty*, it seems highly likely that his earlier writings influenced the

²² Fankhauser, 258–273.

²³ Young, 63–64.

²⁴ A conclusion shared by Paul W. Gates; see "California Land Policy and Its Historical Content: The Henry George Era" in *Four Persistent Issues* (Berkeley: University of California Institute of Governmental Studies, 1978), 22.

farmer–labor coalition responsible for the new tax provisions. *Our Land and Land Policy* launched George into a journalistic phase which brought his ideas to the attention of Workingmen’s Party leaders, who offered him a nomination to the 1878 convention. George declined, however, ostensibly to work on the manuscript for *Progress and Poverty*. Nonetheless, it is safe to conclude that at least some Workingmen’s Party delegates to the convention were familiar with George’s ideas regarding the connections between land monopoly and a multitude of economic problems. As for Grange delegates, the resolutions they carried to the convention suggest that they, too, were influenced by George’s ideas of using the tax system to break up large landholdings. While it is true that the national organization generally disapproved of the single tax movement after 1879, the California Grange members operated under no such restraints during the convention. More telling, however, is an account of the State Grange origins written by Ezra S. Carr, University of California professor of agriculture in the 1870s and a prominent State Grange member. In his 1875 chronicle, Carr displays a thorough understanding of the material Henry George presented in *Our Land and Land Policy*, and he shared George’s disgust for the developing land monopoly. Presumably, he also imparted this knowledge, and his opinions, to other Grange leaders.²⁵

THE ILLUSION OF CHANGE

Despite the Georgist stamp, the new constitutional tax provisions were not braced by single tax or any other economic theory. They were measures designed principally to relieve farmers and laborers of taxes they perceived as unjust. Nevertheless, in ad hoc fashion, the farmer–labor coalition laid the groundwork for a classified property tax system, based on the strategy of including or excluding certain factors in the assessment of various types of property to effect more equitable taxation overall.

²⁵ Barker, 251, 259–261; D. Sven Nordin, *Rich Harvest: A History of the Grange, 1867–1900* (Jackson: University Press of Mississippi, 1974), 211; and Carr, especially Chapter 18, 290–303, “Aids and Obstacles to Agriculture on the Pacific Coast,” in which he discussed California land monopoly, citing information taken from *Our Land and Land Policy*.

For a variety of reasons, however, no classified tax system developed in the years immediately following, and the constitutional provisions had no impact on large landholdings. Conflict between corporations, especially railroads, and the Legislature over assessment seriously hampered the Board of Equalization's effectiveness. In 1880, the California Supreme Court, in *Wells Fargo v. State Board of Equalization* (56 Cal. 194, 198), interdicted the state board from altering individual assessments on county property tax rolls. The board protested to the Legislature, but the Legislature deferred to the court. Thus, the board was powerless to implement the constitutional provision requiring equal valuation of cultivated and uncultivated lands. The board nevertheless pursued with vigor its power to raise or lower entire assessment rolls; and between 1881 and 1892, it issued well over sixty orders to counties to raise their assessments by as little as five or as much as thirty percent.²⁶

Railroads fought new laws under the 1879 Constitution on several grounds. They claimed exemption from state taxation because railroad corporations held federal franchises; they argued that new laws were null and void because they lacked uniformity; they charged that the state board had no constitutional power to make assessments or levy taxes; and they issued a host of minor legal complaints. Through litigation, railroads managed to avoid paying substantive taxes for several years. Although the state did not start keeping separate figures for revenues derived from railroad property (assessed by the State Board of Equalization) and all other property (assessed by counties) until 1884, figures from that year forward suggest that railroads paid taxes only when no legal loophole could be contrived to escape (see Table 6).²⁷

Such developments might have sustained the political energies of those dissatisfied with property taxation if the precipitating circumstances of the 1870s had continued, but they did not. The Workingmen's Party, its strength chiefly derived from the immediate demands of unemployed workers, collapsed as quickly as it arose once the business economy regained strength. More important, however, Grange membership continued to decline as

²⁶ See Simeon E. Leland, *The Classified Property Tax in the United States* (Boston and New York: Houghton Mifflin Co., 1928), 52–64, for a discussion of the various techniques which have been used to achieve a classified property tax; Fankhauser, 286–289.

²⁷ Fankhauser, 298–310.

agriculture entered a period of rapid growth and change. From 1870 to 1900, extensive land use gave way to intensive land use and a specialized agricultural industry. Vineyards, fruit and nut orchards, hops and sugar beet fields, and pastures for dairy operations replaced cattle ranges and vast grain fields. The change resulted from improved transportation, the introduction of irrigation in the 1860s, the growth of financial institutions able to mobilize and reallocate capital to develop land resources, population growth that expanded markets, and state policies that promoted agricultural research and encouraged immigration. Foreign and domestic population growth increased the number of farmers from about 48,000 in 1870 to over 145,000 by 1900. Foreign immigration also brought a cheap labor source; without Asian or East Indian laborers, intensive agriculture could not have succeeded as it did. Between 1860 and 1900 the number of farm laborers in California increased from about 15,000 to almost 72,000. These combined factors stand behind the phenomenal increase in improved farmland acreage. In 1849, fewer than 33,000 acres were improved, and few people thought that agriculture could be developed in California's semi-arid climate. By 1889, improved farmland reached a peak of twelve million acres. During the 1880s, consequently, farmers tended to form organizations based on crop specialty as a means to share information concerning the latest farming methods and plant varieties best suited to the state's climates. Until the 1910s, the Grange was the only general farm organization of note in the state, and its dwindling membership was concentrated in a few Northern California counties. Farmers' interests now lay chiefly in agricultural development, not in political action.²⁸

The taxation provisions of the 1879 Constitution, as they were implemented by law, did not produce the reforms that the Grange and the Workingmen's Party had sought. The state, through the Board of Equalization, had slightly more control over the taxation of railroads and other corporations; and farmers secured separate assessment of real and personal property. Neither change proved to be wholly satisfactory, but relative economic prosperity through the early 1890s dissipated political unrest. In the end, constitutional underpinnings introduced in 1849 for land and tax policies

²⁸ Chambers, 12–13; Nash, 139–158; Paul S. Taylor and Tom Vasey, "Historical Background of California Farm Labor," *Rural Sociology* 1 (1936): 281–295.

remained substantially unchanged. The general property tax system remained under the quasi-official control of local governments. Equalization remained more a hope than a promise. Most land claims had been settled, but large landholdings remained a source of irritation to those who saw their potential for developing California's agricultural economy. These conditions set the stage for a prolonged reform movement in the early twentieth century which had long-term implications for rural land-use policies.

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Chapter 3

FROM HOME RULE TO LOCAL AUTONOMY: REJECTING REGIONAL PLANNING

As previously noted, “home rule” is a slippery concept of political theory. A precise definition is impossible, for the term had various meanings when it was in current use during the era of progressive politics. In more recent years, the term has been employed almost generically to mean “local autonomy.” The change is important. California politics surrounding land planning and property taxation from about 1900 to 1929 illuminate some of the issues and goals bound up in home rule and allow one to glimpse the synchronous distillation–dilation process by which home rule has come to mean local autonomy.

In 1911, California voters approved a constitutional amendment which extended to counties the authority to frame charter governments consistent with the state Constitution. Between 1911 and 1950, ten counties adopted charter governments which the Legislature approved: Los Angeles, San Bernardino, Butte, Tehama, Alameda, Fresno, Sacramento, San Diego, San Mateo, and Santa Clara. Non-charter counties remain governed by state general law. In large part, the differences between charter and non-charter county governments are structural, concerning such things as the number of supervisors or the range of public offices. However, considerable legal debate developed between 1911 and 1950 over whether a charter was a grant

or a limitation of power, that is, whether a charter granted a county powers not reserved wholly for the state, or whether a charter limited any county's powers to those expressed in its charter. During this period, some key state legislative debates also focused on what powers the state would reserve and what powers the state would extend to local governments.¹ Debates in two areas, planning and taxation, are especially important because, by 1930, the outcome of those debates transformed selective home rule into catholic local autonomy and established the policy framework for later land conservation issues.

RURAL LAND PLANNING: PRELUDE

In 1926, Thomas Adams, director and principal designer of the New York Regional Plan, forecast that “interspersed between the closely developed areas” of the regional communities of the future there would be “areas zoned and permanently reserved for agricultural purposes.” Adams, who was projecting his vision of the future New York metropolitan area at the time, advocated that agricultural reserves should “lie between the transportation and power corridors and [urban] focal points” to “maintain an efficient and economical balance of development.”² A respected and influential planner, Adams derived his ideas about regional planning from the same source as did many of his colleagues: Englishman Ebenezer Howard.

¹ *California Constitution*, article XI; Jane Gladfelder, *California's Emerging Counties* (Sacramento, County Supervisors Association of California, 1968), 8–10; Joseph D. McGoldrick, *Law and Practice of Municipal Home Rule, 1916–1933* (1933; New York: AMS Press, 1967), 49–54. California was the first state to adopt county home rule.

² Thomas Adams, “Forecast: The Regional Community of the Future,” TS dated September 9, 1926 (8, 10), sent to S.F. Regional Plan Association by Russell Van Nest Black (Records of the Regional Plan Association of San Francisco Bay Counties [hereinafter cited as RPA Records], Ctn. 1, Bancroft Library). Adams, a surveyor by training, was the first secretary of the International Garden City and Town Planning Association, manager of Letchworth, and the first president of the British Town Planning Institute. During the course of the ten years it took to complete the New York Regional Plan (1921–1931), Adams was to depart from Howard's basic garden city concept; and when the ten-volume plan was finally completed, Lewis Mumford criticized Adams for planning for continuous geographic expansion of the city. See Daniel Schaffer, *Garden Cities for America: The Radburn Experience* (Philadelphia: Temple University Press, 1982), 74–77.

In his inspirational work, *To-Morrow: A Peaceful Path to Real Reform* (1898), Howard proposed integrating urban and rural areas into constellations of “garden cities.” His ultimate concern was to remedy urban blight, but the ideas he advanced argued for more than decentralizing industry and fanning the urban population out into amorphous suburban conglomerations. Howard observed that urban congestion and industrial pollution were accompanied in rural areas by declining populations, economies, and social opportunities. Both urban and rural conditions, he argued, could be improved if new towns of limited population were established in rural areas and if industry, commerce, and agriculture were integrated to provide a diversified economic base for the entire town–country region. Municipalities, according to Howard’s plan, would own the urban and rural lands within their confines and lease land to their inhabitants, thus capturing the unearned increment so as to preclude land speculation on the one hand and, on the other, provide ample income for municipal improvements and services. A constellation of garden cities would fall under the jurisdiction of a regional administrative unit that could imbue garden city principles with the force of law.

Howard’s utopian quest was to create town–country regions that would foster in their denizens nothing less than health, prosperity, mental acuity, and civic pride. He envisioned urban and rural England as one day interconnected by a network of garden cities; but the experimental communities established according to his principles, Letchworth and Welwyn, remained isolated examples. And as imperfect physical embodiments of Howard’s still-maturing ideas, the two communities inspired critics to define the limits, rather than fathom the possibilities, of his garden city concept, which was destined never to be adopted in its entirety.³

During the 1920s, American city planners embraced the garden city concept in theory, but only a handful of individuals at the core of the Regional Planning Association of America — notably Lewis Mumford,

³ Ebenezer Howard, *Garden Cities of To-Morrow* (London: Faber and Faber, Ltd., 1945). This edition, with a preface by F.J. Osborn and an essay by Lewis Mumford, follows the 1902 edition published under the same title, but includes selected passages from the 1898 original publication, *To-Morrow: A Peaceful Path to Real Reform*. See also Schaffer’s discussion of Howard’s influence in both England and the United States, Chapters 1 and 2, *Garden Cities for America*.

Benton MacKaye, Henry Wright, Sr., and Clarence Stein — ever tried to implement Howard’s concept without entirely sacrificing its essential principles: community ownership of land, greenbelts to foster balanced urban–rural spatial growth, and balanced urban–rural economic growth. These principles, however, mandated a radically different economic approach to land development. In practice, most planners treated open spaces surrounding urban areas either as protective buffers or as sources of new land for expanding cities, not as integral parts of a larger regional community and economy. For example, planning consultant Harland Bartholomew wrote, in a 1925 statement concerning regional planning for the San Francisco Bay Area, that “little attention is ever given to the preservation and full utilization of agricultural areas within or adjacent to metropolitan districts or regions.” Rhetoric notwithstanding, Bartholomew’s ultimate concern was the city; and he therefore argued that zoning be used to prevent “undue withdrawal of land best suited for agricultural purposes in advance of its need for actual urban uses.”⁴

Rural planning in the United States, moreover, developed separate from city and regional planning; and rural land-use planning evolved out of concerns quite apart from those of city and regional planners. In California, especially, rural land-use planners focused, until the 1950s, on issues that had little bearing on land use. In the 1910s, for instance, rural planners in California sought not only to break up large landholdings and to stem the trend of rural-to-urban migration, but also to replace so-called “alien,” particularly Asian, farmers with men and women of Anglo-European extraction. Racially motivated fears, for instance, generated popular support for the state’s 1913 Alien Land Law. Many Californians felt that Japanese immigrant farmers, in particular, were advancing too rapidly up the economic ladder, and there was anxiety that Asians might gain an even greater foothold if large tracts of land suitable for agriculture were opened to settlement.

⁴ Harland Bartholomew, “The San Francisco Bay Region: A Statement Concerning the Nature and Importance of a Plan for Future Growth,” TS submitted to the Regional Plan Association, September 1925, 7, 20 (RPA Records, Ctn. 1). Bartholomew studied civil engineering at Rutgers from 1907–1909 (honorary degree, C.E., Rutgers, 1920). By the mid-1920s he had helped to design plans for about forty American cities, including Washington, D.C.’s 1920 zoning ordinance.

ELWOOD MEAD AND THE LAND SETTLEMENT BOARD

Planners surely played a part in the slow evolution of a state policy regarding California's agricultural lands, but their role is difficult to ascertain with precision because their ideas led them to take widely diverging paths. The state's earliest efforts to direct agricultural land use were for the express purpose of rural development, not land conservation. In 1910, the Commonwealth Club of California, an august body of the state's business, professional, and civic leaders which served as an unofficial advisory body to the Legislature from the turn of the century through the 1920s, took up discussion of natural resources conservation and state aid to agriculture. Its discussions led to the Land Settlement Act of 1917, a state-funded program to promote small-farm land use and development.

When the Commonwealth Club turned its attention to the broad topic of conservation in 1910, a committee was assigned to study and make recommendations concerning legislation for agricultural land. Although the committee considered soil tillage, cultivation, irrigation, drainage, and fertilization to be important, its principal focus was farm size, which then averaged about 320 acres in California. Farms over 160 acres were, the committee held, the major contributors to wasted soil fertility because large farms, they assumed, were inherently subject to "ignorant and ruthless mismanagement." California's agricultural lands could best be conserved, the committee argued, by subdividing large landholdings and by fostering, through education, intensive farming using the most up-to-date scientific techniques. "The small farm well tilled," the committee judged, "is decidedly the factor of first importance in maintaining the soil's productive power."⁵

Proposed legislative measures resulting from the Commonwealth Club's study of natural resources conservation as well as the investigations of the State Conservation Commission, a fact-finding body established in 1911, did not, however, include agricultural lands. Water and, to a lesser

⁵ "Conservation," *Transactions of the Commonwealth Club* [hereinafter cited as *Transactions*] 7, no. 2 (1912): 131-146. The members of the committee were Charles B. Lipman, professor of soils, and Leroy Anderson, professor of agricultural practice, both at the University of California, Berkeley, and Frank Adams, an irrigations investigator for the U.S. government.

degree, forest and mineral development became the foci of a long-term, heated debate. Public utility companies opposed virtually every conservation bill proposed in the Legislature up until 1920. When the state finally established a Department of Natural Resources in 1927, the purview was limited to the state's forest reserves, minerals, and fish and game: it lacked jurisdiction over land and water policies. The Commonwealth Club's discussion nevertheless indicates that at least some Californians believed that privately owned agricultural lands, particularly those held in large tracts, should be subject to regulatory land-use policies.⁶

Although political debate over water and mineral rights ultimately overshadowed natural resources conservation issues, agricultural land-use planning meantime emerged under the guise of a brief but important state-directed effort to rechannel development of California's agricultural industry and rural society. Large landholdings, the legacy of a disreputable nineteenth-century land administration system, still concerned a great number of citizens. During the early twentieth century, muckraking journalists exposed land settlement schemes promoted by landowners whose motives were ethically questionable. Civic and political leaders caught up in the reform fervor of the decade thus determined to break up the remaining large tracts, such as the Miller and Lux cattle empire and the Southern Pacific Land Company.⁷

In 1911, when the Commonwealth Club discussed state aid to agriculture, Edward Berwick, a retired farmer from Pacific Grove, requested information on Australia's land settlement program from Elwood Mead, who was then deeply involved in the Australian experiment. Earlier, in 1907, Mead had accepted a position as chairman of the State Rivers and

⁶ Ibid.; Frank Hichborn, *Story of the California Legislature* (San Francisco, 1911), 137–173; Hichborn, *Story* (1913), 156–168; California Conservation Commission, *Report of the Conservation Commission*, January 1, 1913; California Department of Natural Resources, "Utilization of Natural Resources During California's First Century" (mimeographed report), January 1950.

⁷ See, for example, a series of articles by Bailey Millard published in early 1916 in the *San Francisco Examiner*, especially those of February 20, 1916, "Big Land Holders Keep City Dweller from the Farm He Dreams About: Henry Miller, According to Modest Estimate, Owns at Least 22,717 Square Miles of this Earth," and February 27, 1916, "One-Seventh of State a Government Gift to Railroads; Private Owners Tie Up Empire of California's Forests."

Water Supply Commission in Victoria, Australia. During the next eight years, he supervised thirty-two irrigation projects which were part of a massive, government-financed program whereby the state purchased land, built irrigation systems, planted crops, constructed roads, platted towns, and built homes for prospective colonists. New settlers continued to receive government aid in the forms of long-term government loans; expert farm advice; government-owned nurseries, dairies, warehouses, and slaughterhouses; and government-supported marketing cooperatives. Berwick introduced this concept of government aid to agriculture before the club in 1911. At that time, however, most members preferred instead to see the state monitor farm loan companies and rely on expanded education and university research in agriculture to transform farming into a more efficient, business-like enterprise. Theoretically, farmers would then protect their investments in land by practicing intensive farming and soil conservation. Their goal was to foster the growth of a large class of small-scale, independent farmer-businessmen, managing consistently profitable operations that, in turn, would allow rural communities to support a full complement of social and civic organizations: in short, to replicate the city in the countryside.⁸

Farm market prices remained relatively stable between 1910 and 1915, but land prices advanced steadily. In 1910, the average price for improved land was \$117 per acre; for unimproved land, \$58 per acre. By 1916, the average prices were estimated, at a minimum, to have doubled, although widespread variation existed throughout the state. Many believed California farmland to be overpriced, and prices were higher than those prevailing elsewhere in the country. Rising land prices precipitated concern over whether mortgage adjustments and state-supported agricultural research would be sufficient to keep the small-farm sector healthy. This economic climate helped to create popular support for the state to rescue the independent, small-landholding (Anglo-European) farmer from the market-land price squeeze.⁹

⁸ "State Aid to Agriculture," *Transactions* 6, no. 7 (1911): 407–513.

⁹ *Population Census, 1910*; H.J. Stover, "Annual Index Numbers of Farm Prices, Farm Crop Production, Farm Wages, Estimated Value Per Acre of Farm Real Estate, and Farm Real Estate Taxes, California, 1910–1935," University of California Giannini

Mead's eight years as an integral part of the Australian enterprise convinced him that a similar program could, in California and other western states, "help to break up large holdings," and "increase the rural population" to mitigate effects of a declining rural population nationwide. His secondary mission was, however, to "protect rural civilization from the impending menace of alien ownership." Mead believed that high land prices were driving farmers' sons and daughters to the cities; and he especially feared the combined evils of alien land ownership, non-resident land ownership, and tenant farming: these, he believed, were "politically dangerous and socially undesirable."¹⁰ He was in step with many of his middle-class peers who subscribed to reform causes during the Progressive Era — those who deplored, on the one hand, the economically destructive excesses of monopolistic corporations and, on the other, the supposed threat of social unrest posed by un-Americanized immigrants.¹¹

The remedy, for Mead, was to strengthen the ranks of independent, Anglo-American landowning farmers. His goals were all-encompassing: to replace migrant and alien farmworkers with the once-common but now-vanishing hired man, restore prosperity to small farm operations, rebuild the prestige once attached to farming, and reinvigorate rural institutions and society. All this was necessary "to promote national efficiency, maintain the balance between city and country life, and avert political and social unrest."¹² Mead, as another historian has observed, "dreamed of combining social reclamation with land reclamation."¹³ He was confident that government planning could do what private land settlement efforts had not: "stop the drift of white people away from the land and bring back to the country districts the hopeful independent spirit that marked the early life of this State."¹⁴

Foundation of Agricultural Economics, Report #50, August 1936; "The Land Settlement Bill of 1917," *Transactions* 12, no. 1 (1917): 7–23.

¹⁰ Elwood Mead, *Helping Men Own Farms* (New York: Macmillan Co., 1920), 213, and comments in "Land Settlement in California," *Transactions* 11, no. 9 (1916): 397–407.

¹¹ George E. Mowry, *The California Progressives* (Berkeley: University of California Press, 1951), 91–102.

¹² Mead, *Transactions* (1916), 397–407.

¹³ Paul K. Conkin, "The Vision of Elwood Mead," *Agricultural History* 34 (1960): 88–90.

¹⁴ Mead, *Helping Men Own Farms*, 29–38, 134.

During a trip to California in 1914, Mead took the opportunity to present his ideas to governor Hiram W. Johnson, who helped him to secure the backing of the Commonwealth Club. The club appointed a committee to study government-sponsored land settlement in Australia, Denmark, and Germany. Finding these programs to be meritorious, the club requested that the state undertake its own investigation. In 1915, the Legislature acted positively on the request and created the State Commission on Colonization and Rural Credits. Mead, returned from Australia that year, was appointed its chairman. Other members of the commission included Mead's good friend David P. Barrows, president of the University of California; Chester H. Rowell, editor of the *Fresno Republican*; Mortimer Fleishacker, a San Francisco manufacturer; and Harris Weinstock, a San Francisco merchant. All the commissioners were prominent members of the Commonwealth Club. Weinstock, in addition, had visited Australia sometime between 1907 and 1910, during which time he observed firsthand the government's land settlement program.¹⁵

The commission held several public hearings, studied over thirty privately developed farm colonies throughout the state, and amassed statistics on farm operating costs, farm tenantry, and the racial composition of farm tenants in California. In the end, however, the commission's recommendations were based not so much on its investigation as on an assumption that the state's rural areas were suffering from "arrested development." They blamed this intolerable condition on "high prices of land, high interest rates, and [the] short terms of payment" extended to prospective settlers. The commission recommended that federal and state legislation be enacted to enable the federal government to "construct and operate irrigation systems" and the state to "direct the subdivision, sale and settlement of the land, inaugurating a system of financial aid and practical advice to the settlers." It further recommended that "the whole development be planned in advance . . . including the provisions of homes for farm laborers, farm units of varying sizes, and plans for towns, roads, and schools."¹⁶

¹⁵ Conkin, 90; "The Land Settlement Bill," *Transactions* 10, no. 5 (1915): 83; Gerald D. Nash, *State Government and Economic Development* (Berkeley: University of California Institute of Governmental Studies, 1964), 344–345.

¹⁶ California Commission on Land Colonization and Rural Credits, *Report of the Commission on Land Colonization and Rural Credits*, November 19, 1916 (Sacramento,

The commission's parent organization, the Commonwealth Club, vigorously debated its report. Several speakers prepared statements in opposition, including two attorneys, the general manager of the Sacramento Valley Development Association, and a realtor. Their arguments against the report and the bill centered on two points. First, they argued against subsidizing some farmers at the expense of taxpayers and other farmers, the latter of whom might suffer the effects of lower market prices because of increased competition. Second, they argued that state-directed land settlement designed, in part, to break up a few large landholdings would absorb the initiative, not to mention jeopardize the profits, of reputable private land colonizers.¹⁷

The opposition did not, however, prevail. The Legislature passed the land settlement bill in order "to improve the general economic and social conditions of agricultural settlers within the state."¹⁸ Governor Johnson once again appointed Mead as chairman of the Land Settlement Board created under the act's auspices. The board received an initial appropriation of \$260,000 in 1918, and an additional \$1 million in 1919. These sums enabled the board to establish two experimental colonies: one of 6,239 acres near Durham, in Butte County, and one of 8,400 acres near Delhi, in Merced County. Durham, launched in 1918, was a colony of 110 farms, ranging in size from nine to three hundred acres, and thirty farm laborers' allotments of about two acres each. It promised to be successful beyond all expectations, a circumstance that propelled Mead into a position with the U.S. Reclamation Service. But Delhi, begun a year later and planned entirely for World War I veterans, was barely under way when the farm recession of the 1920s began: declining farm receipts hindered colonists' ability to repay their shares of the state's costs. Thus, in 1928 the state opted to withdraw after it became clear that the program would probably never be self-supporting. By 1930, colony lands had passed into private ownership.¹⁹

Mead's vision of American society was narrowly idealistic, and it excluded those who were not of Anglo-European descent. Yet his Jeffersonian agrarianism was attractive to many who believed that a long-standing

1916), especially 7, 119–120.

¹⁷ *Transactions* 11, no. 8 (1916): 416–428; *Transactions* 12, no. 1 (1917): 12–51.

¹⁸ *California Statutes*, 1917 (Extra Session, 1916), Chapter 755.

¹⁹ Conkin, 90–92; Nash, 345–356; Mead, *Helping Men Own Farms*, 106–139.

American institution of small farms and independent farmers was degenerating, in California at least, into a system of large landholdings with absentee owners who entrusted husbandry to immigrants considered to be unassimilable. In his new post with the Reclamation Service, Mead worked with Franklin K. Lane, secretary of the interior, to promote a federal land settlement program based on his experiences in Australia and California. His ideas, moreover, influenced New Deal land-use planning programs as well as state land colonization projects in Arizona, Washington, Minnesota, and South Dakota. Californians, however, displayed waning enthusiasm for government-sponsored land settlement and rural land planning.

REGIONAL PLANNING AND THE STATE PLANNING ACT, 1921–1929

In 1927, when California was about to withdraw from its first foray into state-directed agricultural land development, the Legislature passed the State Planning Act. Despite the act's name, it did not really provide for state planning. Instead, it empowered the governor to designate regional planning areas and commissions if existing city or county planning commissions requested them. Any regional planning commission thus established was authorized by the act to prepare and adopt a physical development plan that might include proposals for streets, parks, open spaces, public buildings, utilities, and "the general location of forests, agriculture and open development areas for the purposes of conservation, food and water supply . . . or the protection of future urban development."²⁰

Whereas during the 1910s Mead and the Land Settlement Board promoted rural development without thought of regional planning, the state now adopted a policy of regional planning that looked upon agricultural areas as chiefly valuable for urban food supplies and as urban buffer zones. By the mid-1920s, the difficulties encountered by the Land Settlement

²⁰ *California Statutes*, 1927 (Extra Session, 1926), Chapter 874 [repealed *Statutes*, 1915, Chapter 428, and *Statutes*, 1917, Chapter 735]; see especially Sections 26–28, which pertain to regional planning; William Spangle and Associates, Inc., "The Planning Law of California: An Analysis," preliminary technical report prepared as a component of the California State Development Plan Program, August 1965, 19, 24; Mel Scott, *The San Francisco Bay Area: A Metropolis in Perspective* (Berkeley: University of California Press, 1959), 199.

Board led those concerned with regional planning to look askance at rural land-use planning and development. Rapidly expanding cities, moreover, seemed to demand immediate attention. Thus, the Commonwealth Club, which once supported the land settlement experiment, now lent its support and prestige to the regional planning movement.

Regional planning is, in some ways, a misleading term for a body of assorted ideas which had been gaining wider acceptance since 1921 in California's two metropolitan areas, Los Angeles and San Francisco. Orderly metropolitan growth was the true goal of those individuals, representing a wide variety of professions and business interests, who sat on the planning commissions in these cities. City planning emerged as a professional field only in the late 1920s: Harvard University established the first American university program in 1929. Architects, landscape architects, and engineers were the principal planners of the 1920s. Aesthetic and technical concerns shaped their planning ideas. Few planners considered the social or economic aspects of their work, although the Regional Planning Association of America was a notable exception.²¹ American city and regional planning, in addition, originated on the East Coast, and West Coast planning commissions were in touch with emerging ideas chiefly through the consultants they hired. So if regional planning seems, in retrospect, to overestimate their undertakings, it is because they were groping, at the time, for a means to direct long-term urban growth; and the young regional planning movement offered them their best guidance.

Most Californians who advocated for regional planning in the 1920s simply had no clear idea of what they meant by it, but their planning impulse clearly had an urban focus. Thus, G. Gordon Whitnall, director of the City Planning Commission of Los Angeles and guiding force behind the Los Angeles Regional Planning Commission, established in 1922, admitted that he was "at a loss to know how to approach this broad subject of regional planning" in a speech before the Commonwealth Club in 1923. He noted, however, that the regional planning movement was a necessary reaction to burgeoning metropolitan centers — namely New York, Chicago, Boston, Los Angeles, and San Francisco — which, "in the normal process

²¹ Eugenie Ladner Birch, "Advancing the Art and Science of Planning: Planners and Their Organizations, 1909–1980," *Journal of the American Planning Association* 46, no. 1 (January 1980): 22–49.

of expansion” had “assumed such proportions as to encroach physically upon the domain of their neighbors.” Encroachment most often took the noxious forms of sanitation problems and traffic congestion, and regional plans were designed principally to alleviate these situations.²²

Urban community interdependency became the theme of 1920s’ regional planning advocates. For example, Hugh R. Pomeroy, secretary of the Los Angeles Regional Planning Commission, asserted in a presentation before the 1924 National Conference on City Planning that “Regional Planning is based upon the conception of . . . inter-community interest, or metropolitan unity.” Regional planning in California and elsewhere was an extension of city planning, although its adherents no longer succumbed to the old “city beautiful” illusions of the previous two decades. Regional plans developed for both the Los Angeles and San Francisco Bay areas reflected this urban bias. Activities of the Los Angeles regional planning body included standardizing subdivision regulations throughout the county; designing a system of major highway arteries; organizing various local governmental agencies, the Auto Club, and chambers of commerce to study rapid transit; educating the public to the benefits of zoning; gathering information necessary to undertake the creation of a park and recreation system; and working with the county surveyor to devise a regional sanitation program. Similarly, the nine-county San Francisco regional planning association’s list of objectives was dominated by projects to remedy urban problems: unifying port and harbor development plans, coordinating several highway systems, connecting regional centers with a rapid-transit system, acquiring and developing recreational areas, and removing the sewage and waste polluting the bay.²³

Both Los Angeles and San Francisco attempted to cope with the very real and menacing problems generated by masses of people living in large areas undefined by local governmental boundaries. Yet, salutary as their

²² “Regional Planning,” *Transactions* 18, no. 8 (1923): 255–256.

²³ Hugh R. Pomeroy, “Regional Planning in Practice,” 16-page TS of paper presented before the Sixteenth National Conference on City Planning, Los Angeles, April 7–10, 1924 (RPA Records, Ctn. 1); Russell Van Nest Black, “A Regional Plan for the San Francisco Bay Counties,” *American City Magazine* 33 (July 1925): 22–23. See also Frederick W. Dohrmann, Jr., “Statement of Purpose of the Regional Plan Association of the San Francisco Bay Counties,” February 10, 1925, and Harland Bartholomew, “The San Francisco Bay Region,” September 1925 report (RPA Records, Ctns. 1, 5).

metropolitan goals were, both planning bodies generally treated agricultural areas adjacent to their cities merely as reserves for future urban expansion. In considering the future of the Los Angeles metropolitan area, the Regional Planning Commission deplored the county's lack of proper zoning authority to control the development of residential, commercial, and industrial areas that steadily chewed away at "the retreating frontier of agriculture."²⁴ A minor objective of the San Francisco group was to secure "regional zoning for the determination of the areas best suited to homebuilding, to industry, and to agriculture." Its major concern was to curb "extensive land speculation" in "large areas of extremely fertile and productive agricultural land" so that these areas would not "be withdrawn from agricultural use and be subdivided into town lots many years before there was any justification for such withdrawal." The San Francisco association advocated regional zoning as a means to segregate and reserve agricultural land "within easy reach of all cities" because "the further afield [agriculture] is driven the greater the cost of living becomes in the cities on account of the long haul required to the city markets."²⁵

As activities progressed, however, Bay Area planners focused their energies on solving traffic and sanitation problems. Agricultural land-use planning, even for the narrowly conceived goals of preventing premature urban development and preserving local produce markets, dropped from the agenda. This shift in perspective occurred, in part, because the magnitude of urban physical problems often required city officials, planners, and engineers to divide as well as narrow their foci. The shift also resulted from a growing awareness that planning for areas outside metropolitan governmental boundaries simply was not feasible.

Both the Los Angeles and San Francisco regional planning bodies evolved from semiofficial organizations. In Los Angeles, an ad hoc group of officials from the county, from various cities, and from special districts, plus private citizens, met voluntarily in several planning conferences

²⁴ Pomeroy, "Regional Planning in Practice," 10.

²⁵ Bartholomew, 7; Guy Wilfred Hayler (planning engineer for the RPA), "The San Francisco Bay Region of the Future: What the Great Regional Plan Means," reprinted from *Daily Commercial News* in its *Annual* (San Francisco, 1926); "Report of Chief Technical Work Prepared for Regional Plan, January–November, 1926" (RPA Records, Ctns. 1, 5).

during 1921 and 1922. At their request, the county Board of Supervisors established, by ordinance in December 1922, the Los Angeles Regional Planning Commission under the authority of its home rule charter. Since the Regional Planning Commission's authority came from the county Board of Supervisors, whose jurisdiction did not extend beyond county boundaries, the commission was, in effect, a county planning commission.²⁶

In the Bay Area, regional planning evolved from the activities of the Commonwealth Club. Its City Planning Section, reactivated in 1922, proposed the creation of a planning body that would include government officials and private citizens from the nine counties fronting the San Francisco Bay. To launch the plan, the club sponsored a regional planning conference in April 1924. The conference duly resolved to create a regional association, and a conference committee handled the details of organizing a formal body and raising the necessary funds to finance its initial activities. From January 1925 until April 1928 the Regional Plan Association of the San Francisco Bay Counties labored, unsuccessfully, to secure an equal commitment to regional planning from each of the nine counties. Various factors thwarted the association throughout its tenuous three-year existence: competition between San Francisco City and Oakland for port dominance in the bay, and a common fear expressed by outlying cities that any plan ultimately would give San Francisco City control of the region's development. When all sources of financial support dried up, the association disbanded.²⁷

The San Francisco and Los Angeles planning commissions nonetheless stimulated interest in regional and county planning among two other politically influential groups: the California Real Estate Association and the League of California Cities. In March 1927, the two organizations co-sponsored the Second Annual California City Plan Conference in Oakland, where Los Angeles and San Francisco regional planning concerns were much discussed.²⁸ The Real Estate Association and the league also

²⁶ Judith Norvell Jamison, *Coordinated Public Planning in the Los Angeles Region*, Studies in Local Government, no. 9 (Los Angeles: University of California Bureau of Governmental Research, June 1948), 130.

²⁷ *Transactions* 18, no. 8 (1923): 252–253; Scott, 185–201.

²⁸ "Official Invitation to the Second Annual California City Plan Conference" (RPA Records, Ctn. 5). Hugh Pomeroy, secretary of the Los Angeles Regional Plan-

worked in concert with the Commonwealth Club to support adoption of the 1927 State Planning Act. The Legislature, however, passed the act with reservations, anticipating that the law would create “new problems of city and county procedure,” and would raise “many new legal questions.”²⁹

The 1927 law, as some anticipated, was repealed two years later because it permitted, rather than mandated, non-charter counties to establish planning commissions and was therefore in violation of the state Constitution, which required county governments to be uniform. In addition, the 1927 act defined “region” in general terms that allowed existing planning commissions to determine regional boundaries and designated the governor as the sole referee to judge whether boundaries so established were justified on demographic, geographic, or economic grounds. A new planning act superseded the old in 1929. This act empowered counties to establish planning commissions and set forth procedures for adopting county zoning ordinances. It also redefined regions more or less as special districts, whereby voters could petition county boards of supervisors with jurisdiction over territory lying within the boundaries of any proposed regional planning district in order to initiate district formation. The state, by virtue of the act, disclaimed any authority over regional planning and vested this power entirely in country governments.³⁰

The Planning Act of 1929 marks the end of one era and the beginning of another. It was the legislative fruit harvested from almost two decades of policy experimentation. During those two decades, the state embarked on an ambitious rural land settlement program that was, to some, a disappointing failure. Regional planning efforts, urban in orientation, were hardly more successful. Bay Area counties would not submit to a regional supergovernment, and regional planning in Los Angeles amounted to

ning Commission, detailed “What Regional Planning Has Accomplished in Los Angeles County”; Frederick Dohrmann, Jr., president of the San Francisco Bay Counties Regional Plan Association, outlined “A Regional Plan for California’s Metropolitan Areas”; and Stephen Child, consultant in city planning, explained “The Regional Planning Organization of the Ruhr Adapted to the Bay Region.”

²⁹ Ralph B. Wertheimer, “Constitutionality of Rural Zoning,” *California Law Review* 26 (January 1938): 178.

³⁰ Wertheimer, fn. 12; *California Statutes*, 1927, Chapter 874, Section 26; *California Statutes*, 1929 (Extra Session, 1928), Chapter 838, especially Sections 15–16 concerning regional planning; Scott, 199; Spangle and Associates, 24.

county planning. Thus, regional planning in California consisted of little more than rhetoric, and rural planning lacked meaningful scope because it neglected cities.

RURAL LAND PLANNING: A POSTSCRIPT

The form of regional planning emerging in Los Angeles and San Francisco during the 1920s reflected a nationwide trend to extend so-called engineered city planning, with its emphasis on physical infrastructures, to the hinterland. But engineered planning competed with another approach, one which Roy Lubove has called “regionalism.” The latter, quite distinct from the more technically oriented regional planning, is associated with the New York-based Regional Planning Association of America (RPAA).

Lewis Mumford, Benton MacKaye, Clarence Stein, and Charles Harris Whitaker, principal luminaries of the RPAA, were not only attracted to Ebenezer Howard’s concept of interlocked rural and urban economies, land uses, and societies, but they also were attracted to Patrick Geddes and his concept of geotechnics, or applied geography. Regionalism, which grew within the loosely structured RPAA, also influenced New Deal projects carried out under the aegis of the Resettlement Administration and the National Resources Planning Board.³¹ Karl Belser, who may or may not have been inspired by the forebears of regionalism, Howard and Geddes, was no doubt introduced, as a student at Harvard, to the ideas of those who were associated with the RPAA; and he definitely was influenced by New Deal land planning projects. It is a slender, but important, tie that binds California’s progressive land settlement experiments to Belser’s post-World War II greenbelt plans.

Benton MacKaye, more so than any other RPAA member, nurtured the ideas he shared with his colleagues into a philosophy of regionalism. A graduate of Harvard (1901, M.A. 1905), MacKaye entered his chosen career of forestry under the esteemed Gifford Pinchot. At Harvard, he was

³¹ Roy Lubove, *Community Planning in the 1920s* (Pittsburgh: University of Pittsburgh Press, 1963), 107; see also Carl Sussman, ed., *Planning the Fourth Migration: The Neglected Vision of the Regional Planning Association of America* (Cambridge: M.I.T. Press, 1976) for a thorough discussion of the social reform philosophy and goals of the RPAA.

influenced by the writings of Thoreau, Powell, and Marsh; and during his many years with the U.S. Forest Service, MacKaye further explored the philosophical terrain of conservationism. He first articulated his own ideas in a 1919 report written for the U.S. Department of Labor, "Employment and Natural Resources." In autumn 1915, Assistant Secretary of Labor Louis Post (a single tax advocate) enlisted MacKaye's assistance with the department's "investigation of land as an opportunity for workers."³² MacKaye was impressed by Elwood Mead's achievements at Durham, and he likewise drew inspiration from the inclusive goals of Australia's land colonization program. However, whereas Mead felt that the Australian system could be implemented in the United States through a government-administered financial credit program, MacKaye firmly believed that land colonization undertaken to enhance the general welfare necessitated a different approach to land economics.

The Department of Labor hoped, with its investigation, to give form and direction to the diffuse "back to the land" movement of the time. Labor congestion and underemployment in the agricultural economic sector, which accompanied the rural-to-urban demographic shift, inspired some reformers to search for a quick way to transfer factory workers from crowded urban areas onto idle or undeveloped rural lands. MacKaye, however, eschewed temporary expedients to stabilize the labor imbalance and sought instead to devise a plan for creating permanent employment opportunities along with population decentralization: to achieve, in his words, "true access to land . . . through industrial processes."³³

MacKaye's ideal self-sustaining region encompassed agricultural-industrial communities of limited size utilizing, but not exploiting, the combined productive potential of available land, forest, mineral, and water resources. His report to the Department of Labor, however, focused more narrowly on the practical means by which agricultural and timber areas could be developed profitably for large numbers of people according to sustained-yield conservationist principles. With regard to agricultural

³² From the preface by Secretary of Labor W.B. Wilson to Benton MacKaye, *Employment and Natural Resources* (Washington, D.C.: U.S. Government Printing Office, 1919), 3; see also MacKaye, *From Geography to Geotechnics* (Urbana: University of Illinois Press, 1968), 35.

³³ MacKaye, *Employment and Natural Resources*, 13.

development, MacKaye considered the garden city concept to be a useful model for joining the rural farm to the city market through a more efficient use of suburban land. But he was keenly interested in the Australian land colonization experiment, particularly because Elwood Mead's first California colony, Durham, then showed so much potential for long-term success, both economically and politically. MacKaye recommended that the federal government establish a national land development board, which would include the secretaries of labor, agriculture, and interior, for the purpose of devising a program similar to Australia's. Arguing that "natural resources are also national resources," he advocated empowering this proposed board to secure (or expropriate, if necessary) requisite land, secure financing to underwrite initial development costs, and make cooperative agreements with states.³⁴

In large part, MacKaye advocated land colonization as a way for the federal government to atone for its former profligacy: the various homestead acts. Land classification and town planning were mandatory first steps to any colonization program, but MacKaye further argued that "the fee-simple title to all lands reserved or purchased by the federal government or by any state should be held permanently by the government or state." Although he avoided single-tax rhetoric in his report, MacKaye nevertheless asserted that "extra values given to land in the vicinity of settlement areas due to improvements made on such areas at state or government expense should be . . . taken to see that these values go where they belong — to the settler and worker in the equivalent of fair wages, to the legitimate investor in a fair return, to the local community in sufficient taxes, but not to the speculator in unearned profits."³⁵

In 1923, the same year that MacKaye joined Mumford, Stein, and Whitaker to found the RPAA, he also met Patrick Geddes for the first time. Geddes, a biologist whose intellect roamed across many fields, including geography, economics, and history, is chiefly remembered for his espousal of geotechnics. He greatly influenced MacKaye, and his geotechnic ideas became part of the philosophy of regionalism that MacKaye fully articulated in his major written work, *The New Exploration*. In this book, he

³⁴ Ibid., 28–29, 102–112.

³⁵ Ibid., 30.

defined three “elemental” environments: primeval, rural, and urban. All three, he postulated, symbiotically sustain modern society and, therefore, must be developed as well as maintained in balanced proportions to create an “indigenous” environment, or regional community, which is necessary to serve equally man’s physical, cultural, and psychic needs. Development of the urban environment to the neglect, or at the expense, of the rural and primeval results, MacKaye concluded, in a struggle between metropolitan environments and a reluctantly dying indigenous host. “Will the framework which the genius of man has woven,” MacKaye asked, “become a terrestrial lacework for the integration of his own terrestrial powers, or will it become a tangled net in which he will be strangled?”³⁶

Although MacKaye did not disdain technological progress, the “collective haphazardness” of metropolitan growth resulted in more than slums of poverty; it resulted in “slum[s] of commerce” as well. He believed that two major technological advances, electric power transmission and motorized transportation, made orderly decentralized population expansion and economic development entirely feasible.³⁷ MacKaye’s philosophy of regionalism did not, however, permeate his practical applications to the degree one might expect. As urban areas began to assume the cancerous metropolitan proportions that so worried him, MacKaye concerned himself more and more with preserving the primeval. The Appalachian Trail, which he designed, remains as his great tangible achievement. Nevertheless, during the 1930s, he lent his expertise to the Tennessee Valley Authority, and the National Resources Planning Board’s regional planning studies, which incorporated land-use analysis and classification, bore the stamp of his influence.³⁸

³⁶ Lewis Mumford, *Sketches from Life: The Early Years* (Boston: Beacon Press, 1982), 333–338; MacKaye, *Geography to Geotechnics*, 21–24; MacKaye, *The New Exploration* (1928; rpt. Urbana: University of Illinois Press, 1962), Chapter 5, “The Indigenous and the Metropolitan.”

³⁷ MacKaye, *The New Exploration*, 160–165.

³⁸ See, for example, MacKaye, “Tennessee — Seed of a National Plan” (1933) rpt. in *Geography to Geotechnics*, 132–148. Even when the NRPB was directed to shift its focus to postwar urban planning (1941–1943), its studies and coordinated planning projects retained a regional cast; see Philip J. Funigiello, “City Planning in World War II: The Experience of the National Resources Planning Board,” *Social Science Quarterly* 53 (June 1972): 91–194.

Two other RPAA members, Clarence Stein and Henry Wright, applied their architectural and planning skills toward demonstrating a viable alternative to that pursued by Thomas Adams and the Regional Plan Association of New York, which the RPAA criticized as planning for metropolitan expansion, not for regional development. Stein and Wright sought to work out the physical design as well as the economic problems involved in adapting Howard's garden city concept to American aesthetics and institutions. Their most notable success, Radburn (1928–1933), inspired the greenbelt towns of the Resettlement Administration and other New Deal housing projects. But Stein was the first to admit that Radburn failed to meet Howard's ideal because they "sacrificed" an "essential element": the greenbelt. "We did not fully realize," Stein later wrote, "that our main interest after our Sunnyside experience [Sunnyside Gardens, NYC, 1921–1928] had been transformed to a more pressing need, that of a town in which people could live peacefully with the automobile — or rather in spite of it."³⁹

Economic considerations led Stein and Wright to compromise the greenbelt element at Radburn and elsewhere. In Chatham Village (Pa., 1929–32, 1935) the greenbelt became a park strip "insulat[ing the] community from neighborhood depreciation and external annoyance"; at Phipps Garden Apartments (NYC, 1930, 1935), interior garden courtyards; and at Hillside Homes (NY 1932–35), an enclosed commons. Radburn nonetheless stimulated Rexford Tugwell to strive for Howard's garden city ideal with Resettlement Administration community projects. Greenbelt, Maryland, did not achieve his goal, but economically productive agricultural greenbelts were retained and more successfully integrated into the resettlement towns of Greendale, Wisconsin, and Greenhills, Ohio.⁴⁰

The shift from productive rural greenbelts to park-like buffers protecting residential areas from noisome and dangerous motor traffic was a shift of important magnitude. The Radburn idea was incorporated into American new town planning, an approach bearing little resemblance to its progenitor, the garden city. Nevertheless, the Radburn idea is evident

³⁹ Clarence S. Stein, *Toward New Towns for America* (1950; Cambridge: M.I.T. Press, 1966), 38–39.

⁴⁰ *Ibid.*, 85 ff., 122–132. See Joseph L. Arnold, *The New Deal in the Suburbs* (Columbus: Ohio State University Press, 1971), 14–19, for a discussion of the RPAA's influence on Resettlement Administration programs.

in the programmed open spaces and the circulation patterns that separate pedestrian and auto traffic in large-scale planned urban residential developments. New towns, however, such as Foster City in the Bay Area, or Baldwin Hills Village in the Los Angeles metropolitan area, are recognized for what they are: planned, rather than piecemeal, suburban development.⁴¹ Stein, who was the consulting architect for Baldwin Hills Village, played an active role in the transformation; but unlike others who used the Radburn idea, Stein never lost track of the garden city ideal or the philosophy of regionalism. When he later praised the Santa Clara South County plan for its concept of urban centers “united as part of a regional complex” by agricultural greenbelts, he understood the tremendous obstacles confronting Karl Belser.⁴²

The ideas associated with the RPAA represent, in large part, the type of planning that Americans have rejected. Yet, the people-oriented goals they tied to resource conservation and city planning remain attractive. During the 1920s, the RPAA represented an exciting new intellectual current, and it is inconceivable that Karl Belser escaped its grasp when he studied at Harvard. Ironically, for him, the occurrence of these expansive planning concepts coincided with California’s decision to give local governments complete authority over planning.

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⁴¹ Stein documents this shift better than anyone else. See also Eugenie Ladner Birch, “Radburn and the American Planning Movement,” *Journal of the American Planning Association* 46 (October 1980): 424–438. Birch argues convincingly that although Radburn “has acted as a permanent reference for generations of planners . . . as an applied pattern, it has failed to be a determining force.”

⁴² Letter dated October 5, 1957, from Stein to Karl Belser (SCCo Plan Dept, Improvement and Development: Planning, South County Study).

Chapter 4

FROM HOME RULE TO LOCAL AUTONOMY: PUBLIC FINANCE REFORM

In the broader picture of state politics, planning and resource conservation were issues that concerned relatively few people between 1900 and 1930. These matters were seriously debated among the state's civic, business, and professional leaders as well as in the Legislature, but the level of discussion prevailing among them did not carry over to the press. Tax issues were an altogether different matter. They commanded widespread attention.

In 1910, voters opted to separate the sources of state and local revenue, a major change which resulted not so much from populist agitation or progressive reform campaigns, but from a steadily growing gap between state revenues and expenditures. By the turn of the century, industrial development, agricultural expansion, and population growth mandated considerable extensions of government services. Industrial development, in addition, placed an increasing proportion of wealth in forms such as credits and securities, which escaped state taxation. Throughout the 1890s, the State Board of Equalization, the Legislature, the County Assessors' Convention, and the California Grange either requested or initiated investigations of the revenue laws, but no major changes resulted until 1910.¹

¹ Mansel G. Blackford, *The Politics of Business in California, 1890-1920* (Columbus: Ohio State University Press, 1977), 146-148; William C. Fankhauser, *A Financial*

Dissatisfaction continued to mount after 1900, spurred on in large part by complaints from Los Angeles, San Francisco, and Oakland that each city carried more than its share of the state's tax burden. Carl Plehn, professor of finance at the University of California, Berkeley, urged Governor Pardee and the Legislature to consider tax reform by separating the sources of state and local revenue, reserving the general property tax for local governments. Plehn was one of several economists who actively sought to lend expertise toward solving the problems of public finance in the early twentieth century, and he adhered closely to the ideas of Edwin R. A. Seligman, who engineered the separation of sources plan adopted by New York State in 1903. Plehn also enlisted the support of the Commonwealth Club in 1904, and from then until 1910, this group remained the principal civic body investigating the state's tax system.²

In 1905, the Legislature, in addition, created a special Commission on Revenue and Taxation. Plehn was appointed secretary of the commission, and he is the acknowledged principal author of both its preliminary (August 1906) and final (December 1906) reports. The commission's investigation revealed that the general property tax had devolved into a tax on real estate, since only 15–18 percent of the state's general property tax revenues came from taxes levied on personal property. This meant that the burden of property taxation fell most heavily on agriculture, and the commission estimated that farm owners paid in taxes the equivalent of 10 percent of their net income. The commission further noted that intangibles, such as money, credits, and franchises, escaped taxation altogether. Moreover, state banks and savings banks were taxed while national banks were not. To compound matters, the commission concluded that equalization was impossible under the prevailing statutes and case law, which placed tax assessment under the control of local governments.³

Based on these findings, the commission proposed tax reform patterned on plans adopted earlier by Pennsylvania, New York, Connecticut,

History of California, University of California Publications in Economics 3, no. 2 (1913): 368–369; Mabel Newcomer, *Separation of State and Local Revenues*, Columbia University Studies 72, no. 2 (1917): 178–179.

² Blackford, 148–149; Fankhauser, 369.

³ California Commission on Revenue and Taxation [hereinafter cited as Comm Rev and Tax], *Report*, December 1906, especially 3–4, 9–13.

Ohio, and Minnesota. Acting on Plehn's advice, the commission advocated abandoning the general property tax to local governments and establishing newly defined property taxes that would tap corporate wealth. Revenue generated from the latter, as well as from some established special taxes, such as poll and inheritance taxes, would go to the state. The commission admitted that its recommendations were conservative: it addressed strictly the revenue-raising function of taxation and did not attempt to ascertain in any depth the larger economic or political consequences of the new system proposed.

The California separation of sources plan introduced the concept of classified property taxation by categorizing various forms of tangible and intangible property and recommending that each form be taxed at a different (and perhaps fixed) rate. The goal was not so much to achieve overall taxation equality as it was to tax "each class . . . in the manner best adapted to reach its full tax-paying ability."⁴ Three major new taxes were proposed: a tax on the gross receipts of railroads, street railways, utilities, and express companies; a tax on the capital, surplus, and undivided profits of banks; and a tax on all types of franchises. These, the commission asserted, were to be construed as taxes upon the "classes of property sometimes called 'corporate' to distinguish them from the 'private or individual' industries and properties."⁵

Charles Bullock traced the roots of states' tax and revenue problems to the 1860s, when the average general property tax rate in the United States rose from 78 cents per \$100 to \$1.98 per \$100. Between 1870 and 1902 the average rate moved upward only slightly, to \$2.05, but most of it was now levied on real estate. Bullock concluded that "it was mainly the progressive increase of tax rates after 1860 which caused the disintegration of the general property tax."⁶ Thus, if one looks at the national picture, by 1900 not

⁴ Carl Plehn, "Tax Reform in California" in *State and Local Taxation: Fifth Annual Conference, Addresses and Proceedings, September 1911* (Columbus: National Tax Association, 1912), 118; remarks by Plehn in Commonwealth Club of California, "The Proposed Taxation Amendments to the State Constitution," *Transactions* 3, no. 4 (1908): 146.

⁵ Comm Rev and Tax, *Report*, December 1906, especially 77.

⁶ Charles J. Bullock, "A Classified Property Tax" in *State and Local Taxation: Third International Conference, Addresses and Proceedings, September 1909* (Columbus: International Tax Association, 1910), 95–98.

only were various forms of corporate industrial wealth escaping taxation, but personalty (easily concealed) was yielding far less tax revenue, and real estate (in the guise of the general property tax) had reached its tax bearing limit. The tax rates prevailing in California from 1860 to 1900 did not entirely follow the national trend, however (see Table 6, Chapter 2). After sizable increases during the 1860s, the rate fluctuated between \$0.429 and \$0.865 (per \$100 of assessed value) from 1870 to 1900. Overall, the general property tax rate in California was much lower than elsewhere in the nation during the late nineteenth century. But the Plehn Commission nonetheless found that real property still bore the heaviest tax burden.

Other economists, like Plehn, worked closely with public officials during the early twentieth century, searching for politically feasible solutions to public finance problems. Few of these economists seriously entertained ideas of abolishing the general property tax, even though they might publicly criticize it as ill-conceived and impossible to administer equitably, as several decades of unsuccessful attempts to equalize assessments and centralize administration had proved. Rather, mainstream public finance economists generally opted for solutions which did not radically alter the fundamental principles of existing tax systems. Classified property taxation, that is, “ad valorem taxation of property by its segregation into groups or types and the application to these various classes of different effective rates,”⁷ was attractive because it offered a means to make the property tax more flexible and yield more revenue.

California’s 1879 Constitution permitted state income taxation, but Plehn and his colleagues simply dismissed this alternative as “unAmerican.” Instead, the commission chose the separation of sources plan, which necessitated another constitutional amendment to release the state from its obligation to depend on the general property tax as a source of revenue. The separation of sources alternative, moreover, required the commission to specify new forms, or “classes,” of property and to suggest a rate of taxation for each. For taxation purposes, the commission considered foremost the intangible aspect of corporate property and thus proposed a gross

⁷ Simeon E. Leland, *The Classified Property Tax in the United States* (Boston and New York: Houghton Mifflin Co., 1928), 12–41; see especially 40–41 for Leland’s synthesis of early attempts to define the essence of classification.

earnings tax on property used in the operations conducted by companies.⁸ The gross earnings tax thus replaced the general property tax on corporations' operative property.

It is nonetheless debatable whether the 1905–1910 Tax Commission thought of its proposal as a blueprint for classified taxation inasmuch as its overriding concern was to generate more revenue for the state. It was more concerned with taxing corporate property at rates which would yield sufficient revenue without causing corporate interests to rebel. Extending the ad valorem principle was a desirable but secondary goal. Plehn's comments in regard to the 1906 reports generally suggest that he, at least, considered the proposal as one advocating an extension of special taxes to newly specified forms of property, forms referred to as "classes."

The 1906 report and the proposed constitutional amendment, which the Legislature approved for the 1908 ballot, generated considerable controversy, and the debate left many fears unallayed. The commission aroused suspicion when it submitted the August 1906 preliminary report to every corporate or other group interest that might face higher taxes. In a series of hearings that followed, all those affected, with the exception of the Pullman Company, appeared to comment and, in some cases, to recommend changes.⁹ Despite a negative response from Pullman, business interests generally favored the plan and were willing to accept increased taxes "in return for greater stability and predictability in their relations with government," but they also succeeded in keeping their tax rates at the minimum prescribed by the commission.¹⁰

The Taxation Section of the Commonwealth Club strongly objected to the special consideration the commission accorded corporations and questioned whether any plan so acceptable to corporate leaders would, or could, achieve the results the commission predicted. And, despite the much-vaunted separation of sources on which the plan was based, the Taxation Section noted that the state reserved the right to impose a general ad valorem property tax if necessary; thus, the plan would not establish a true separation. It also objected to a provision that would repeal the state's

⁸ *Comm Rev and Tax, Report*, December 1906, 18–19, 50.

⁹ *Ibid.*, 5–6.

¹⁰ Blackford, 149–153, which includes a succinct discussion of corporate reactions to the commission's recommendations.

existing constitutional right to impose an income tax, even though the commission's supposed concern was to boost state revenues. Finally, the Taxation Section report criticized changes the Legislature made, presumably under pressure from corporations. When the proposed constitutional amendment appeared out of the Legislature, rates of taxation were fixed at the lowest levels that (or in some cases, lower than) the commission recommended (see note 11); and the Board of Equalization was to be elected by district, rather than at-large, as the commission recommended. The latter circumstance, many felt, would make it easier for corporate interests to influence board members. After lengthy discussion of the proposed amendment, club members voted so narrowly in favor of supporting it that hardly anyone considered the vote to be an endorsement.¹¹

¹¹ *Transactions* (1908), 110–112, 115, 117–119. Quoting from the report at 111–122:

[1] In every case the Legislature, in fixing percentages to be charged against corporations, either took the minimum suggested by the Commission or reduced even that; for instance:

On railroads the Commission recommended not less than 4 nor more than 5 percent; the Legislature fixed it at 4 percent.

On sleeping-car and similar companies the Commission recommended not less than 4 percent nor more than 5 percent; the Legislature fixed it at 3 percent.

On express companies the Commission recommended 3 percent; the Legislature cut it to 2 percent.

On gas or electric companies the Commission recommended not less than 4 percent nor more than 5 percent; the Legislature fixed it at 4 percent.

On insurance companies the Commission recommended 2 percent; the Legislature reduced it to 1½ percent, and added a rider deducting from that all county and municipal taxes paid by such companies on real estate owned by them in the State. This, it is understood, was inserted to accommodate [sic] one particular insurance company.

[2] The Commission recommended that the tax on banks should be 1 percent upon the full cash value of the shares of capital stock, and that the value of each share should never be taken to be less than the amount paid in thereon, together with its pro rata of the accumulated surplus and undivided profits.

The Legislature makes it 1 percent upon the value (not the full cash value) and provides that such value shall be taken to be the amount paid in thereon, together with its pro rata of the accumulated surplus and undivided profits — omitting the words “never taken at less than.”

[3] The Commission recommended that the percentages and amounts fixed as above should be and remain in force for six years from the adoption of this amendment, and thereafter may be changed by the Legislature at intervals of not less than six years.

Agriculturalists and small-town newspaper editors, in contrast, generally favored the 1908 proposed amendment since its supporters claimed that the new system would reduce farmers' taxes. The State Grange, which formed a permanent committee in 1903 to study taxation and to which the commission also submitted a copy of its August 1906 preliminary report, endorsed the measure. E.J. Wickson, editor of the state's leading farm paper, *Pacific Rural Press*, urged farmers to vote for the amendment, although his motives included a desire to see defeated those urban groups who had branded the proposed amendment as a "selfish rural issue."¹²

The urban group to which Wickson referred was a group of Southern California city assessors, who feared they would lose their jobs if the amendment passed. They waged a vigorous campaign which resulted in a generally negative Southern California vote that helped to defeat the 1908 amendment. Joining them in opposing the measure were San Francisco city officials, who feared that the amendment, if passed, would force the city into heavy bonded indebtedness to finance rebuilding in the wake of the 1906 earthquake and fire. Widespread property destruction temporarily lowered property tax revenues.¹³ The League of California Cities also opposed the measure on the grounds that separation of sources was an "experimental" system. The league was convinced that the plan would not eliminate underassessment practices (only relieve the state from its consequences) and that corporations would merely shift higher taxes onto consumers.¹⁴

Undaunted by defeat, the Revenue and Tax Commission took up the matter once again and submitted a slightly modified proposed amendment to the Legislature, which approved it for inclusion on the 1910 ballot. Business and agricultural supporters lined up much as they had two years earlier, but this time no bitter opposition came from Los Angeles or San Francisco city officials. By 1910, San Franciscans had substantially rebuilt

The Legislature omitted this, forever imbedding in the Constitution the low rates embodied in the amendment as now proposed until they can be changed by amendment of the Constitution.

¹² Blackford, 153–154; *Pacific Rural Press* [hereinafter cited as *PRP*], October 31, 1908; *Comm Rev and Tax, Report*, 1910, 49–50.

¹³ Blackford, 155; Carl Plehn, "Tax Reform in California," 120, 123; *Comm Rev and Tax, Report*, 1910, 50.

¹⁴ *Pacific Municipalities*, 19, no. 3 (October 1908): 37–38.

their city. In Southern California, city assessors now directed their ire toward the State Board of Equalization, which had raised overall assessments in several Southern California counties in 1909. Thus, Southern California assessors decided to support the amendment in the hope that it might rid them of the state board. The Commonwealth Club's Taxation Section raised the same objections it leveled at the 1908 proposal. In the end, however, the club gave the measure a lukewarm endorsement, reasoning that, although imperfect, it would improve the present system. Unopposed by any well-organized interest groups, the 1910 measure received voter approval.¹⁵

Between 1906 and 1911, California and twenty-eight other states established special or permanent commissions for the purpose of revising tax systems. Many states adopted separation-of-sources plans in one form or another, although, generally speaking, there was little discussion of the conditions or limitations under which these systems should be adopted.¹⁶ In California the proposed amendments submitted to voters generated considerable debate, especially in 1908, but surprisingly little discussion was directed toward the ad valorem principle of taxation that the proposal altered. During the Commonwealth Club debate over the 1910 proposition, only two members objected to the plan: one because it "abandon[ed] the scheme of providing public revenue by taxing all property in proportion to its value," even though the commission had not "demonstrated [the principle] to be fundamentally unsound," and the other because it involved "much more than the mere separation of the sources of State taxes. It involve[d] the substitution of a gross income tax on certain corporations in place of the . . . ad valorem tax . . . applicable to all property of every sort."¹⁷

No group stepped forth to offer radical suggestions for tax reform, as one might have expected during these years. Perhaps this is because, as George Mowry has suggested, civic leaders in California — editors, attorneys, small businessmen, real estate developers — did not perceive large

¹⁵ Blackford, 156–157; Plehn, "Tax Reform in California," 121–123; "Constitutional Amendments of 1910," *Transactions* 5, no. 6 (1910): 337–338; *PRP*, October 22, 1920, 327, 329.

¹⁶ Edwin R.A. Seligman, "Recent Reports on State and Local Taxation," *American Economic Review* 1 (1911): 272–295.

¹⁷ *Transactions* (1910), 341, 369.

corporations as a direct threat to their economic interests during what were generally prosperous years in California. In addition, large corporate interests were not as extensive in California as elsewhere, especially in the East. Much of the oil industry, for instance, remained in the hands of independent producers until about 1915. The state's banking industry, moreover, did not begin to stabilize until about 1900, a condition which hampered capital accumulation for large-scale manufacturing or other operations. California progressives therefore never sought the wholesale demise of large business corporations, but they did insist that corporations pay their fair share of taxes.¹⁸

Nor does the movement to separate the sources of state and local revenue appear to have been "primarily an effort to abolish the general property tax."¹⁹ The financial need to tap new sources of wealth led those concerned with public finance matters to seek special taxes on newly defined classes, or categories, of property. And the seemingly insurmountable problems of equalization, which centered on local assessment practices, led them likewise to abandon general property taxation officially to the fate of local governmental control, where, unofficially, control had always been.

THE SINGLE TAX CAMPAIGN

The framers of the separation of sources plan intentionally unburdened the state of general property tax assessment problems, which, of course, did not disappear. If anything, they worsened. Thus, the controversy surrounding the separation of sources plan continued long after its adoption in 1910, and the next twelve years brought forth a host of more radical proposals for property tax reform. Those advocating a single tax on land values enjoyed their most influential period in California history during these twelve years, and it is no exaggeration to say that every serious proposal for tax reform bore the stamp of Henry George's ideas.

Between 1912 and 1922, single tax organizations placed before California voters six constitutional amendment propositions that, had any of them passed, would have established land value taxation as the basis of local taxation. Moreover, a new tax commission, appointed in 1915 and

¹⁸ Mowry, 92; see Blackford on oil and banking interests.

¹⁹ Newcomer, 177.

reporting in 1917, recommended a graduated land value tax. Finally, a special Commission of Immigration and Housing, established in 1913, recommended land value taxation as a means to break up large landholdings in order to encourage settlement and provide greater economic opportunities for settlers.

In 1929, another tax commission estimated that whereas real estate had been assessed at about 60 percent of its full market value at the time of separation, by 1928 the average assessment rate was down to 41.63 percent.²⁰ To justify relieving the state “from the friction accompanying . . . equalization,” the 1905–1910 commission asserted that equalization should be a matter of “home rule.”²¹ Home rule was, no doubt, a term chosen for its voter appeal, but home rule, or local option, was also applied to a single-tax legislative strategy devised by Henry George and Thomas Shearman in New York during the mid-1880s.²² After 1910, home rule became the rallying cry for California’s single-tax advocates, who sought to remove property taxation from any central control or supervision whatsoever as a means to allow local governments to experiment with land-value taxation. They believed that such experiments would prove single tax theory to be sound and that competitive successes would force localities to fall in line by adopting land-value taxation.

Between 1890 and 1902, single-taxers used the home rule strategy in attempts (ultimately unsuccessful) to change the tax systems in Washington, Colorado, Rhode Island, and Oregon. It is thus curious that no single-tax campaign for home rule surfaced in California until 1910. Its absence is due in part to at least two factors. The national single tax movement waned at the turn of the century, following Henry George’s death in 1897.²³ In addition, the tax reform movement in California, and elsewhere, during the early-twentieth century was heavily influenced — even directed — by economists with academic credentials, not by taxpayer special interest

²⁰ California Tax Commission, *Report* (1929), 158, Table II-10.

²¹ Comm Rev and Tax, *Report*, December 1906, 11; Marvel M. Stockwell, *Studies in California State Taxation, 1910–1935* (Berkeley: University of California Press, 1939), 31.

²² Charles J. Bullock, “Local Option in Taxation” in *State and Local Taxation* (Columbus, 1912), 31; Arthur Nichols Young, *The Single Tax Movement in the United States* (Princeton: Princeton University Press, 1916), 230.

²³ Young, 139–162.

groups. In California, moreover, close ties between the tax commission and corporations probably would have blocked the effectiveness of any group advocating more radical reform.

In 1909, however, Joseph Fels established a fund for the purpose of reviving the single tax movement, and the Fels Fund supported the California single tax campaign from its inception through 1915.²⁴ The campaign began in 1911, when J. Stitt Wilson, mayor of Berkeley and an outspoken advocate of the single tax, convinced the League of California Cities to support home rule in taxation. He argued that home rule would lead to the adoption of the single tax that, in turn, would force the breakup of extensive landholdings since the tax would make large “undeveloped” parcels of land expensive to hold. More farmers on the land would aid the development of agriculture in California, which, so his argument ran, would boost the state’s economy.²⁵

Activities following Wilson’s speech led to the formation of the Home Rule in Taxation League, to which the Fels Fund gave financial support. The Home Rule League circulated initiative petitions throughout the state to place a home rule in taxation constitutional amendment proposition on the November 1912 ballot, and again on the 1914 ballot. The 1912 proposition was written in a general manner to allow local option in property taxation. The 1914 measure represented a slightly different tactic to achieve the same end; it proposed authorizing cities or counties to *exempt* several classes of property from taxation.²⁶

Neither the 1912 nor the 1914 ballot propositions garnered enough support to pass, although in each case about 41 percent of the voters favored them.²⁷ Compared to later single tax campaigns, the 1912 and 1914

²⁴ *Joseph Fels Fund Bulletin* [hereinafter cite as *JFFB*] 1, no. 11 (November 1913): 4; *JFFB* 4, no. 12 (December 1916): 1; Young, *The Single Tax Movement*, Chapter 8, “Still Agitating the Land Question.” See also Arthur Power Dudden, *Joseph Fels and the Single-Tax Movement* (Philadelphia: Temple University Press, 1971).

²⁵ *Pacific Municipalities* 25, no. 4 (November 1911): 137–145; League of California Cities, *Proceedings, 14th Annual Conference, 1911* (League of California Cities, 1911), 152–177.

²⁶ *Pacific Municipalities* 27, no. 1 (January 1913): 20–35, v. 27, no. 2 (February 1913): 63–67, and v. 27, no. 11 (November 1913): 648; *JFFB* 4, no. 12 (December 1916): 2; California, Secretary of State, *Ballot Arguments*, 1912, 1914.

²⁷ California, Secretary of State, *Statement of the Vote*, 1912, 1914.

campaigns sparked relatively little public debate, but it is nonetheless possible to identify at least some of the supporters and opponents. The League of California Cities, of course, supported both measures. Voting records show, moreover, that overwhelming support for the 1912 measure came from San Francisco County, but after then San Francisco support gradually waned. The Commonwealth Club, whose membership was drawn largely from the San Francisco area, gave only lukewarm support to the 1914 measure, presumably because those participating in the prolonged debate were strongly divided on the merits of the single tax.²⁸

Waning enthusiasm in San Francisco is probably attributable to the Anti-Single Tax League, organized in late 1912 specifically to fight the home rule amendment. Single tax advocates alleged that the organization was a front for the Southern Pacific Railroad.²⁹ While Southern Pacific may have contributed to its support and direction, the Anti-Single Tax League leadership suggests that the group attracted broad support from the business and financial communities. The original executive committee included three bank presidents; two representatives from the Tax Association of California (allegedly controlled by utility and railroad corporations); one insurance company president; the president of the Fresno Chamber of Commerce; Thomas Bard, ex-U.S. senator and large landholder in Ventura County; a representative of the State Grange; Carl Plehn; and A.B. Nye, the state controller. It was a conservative, politically well-connected group, and it sought sustaining contributions from among its members' many contacts.³⁰

Although the State Grange lent official support to the Anti-Single Tax League, individual farmers were attracted to the land value tax. E.J. Wickson, editor of the *Pacific Rural Press*, advised subscribers to vote "no" on the 1914 measure, claiming that because a land-value tax could not be shifted, farmers would bear an additional tax burden that would ultimately benefit urban capitalists, who could erect rental-lucrative multistory commercial

²⁸ *Statement of the Vote, 1912–1922; Transactions* 9, no. 4 (1914): see especially 288.

²⁹ *JFFB* 1, no. 6 (June 1913): 4; and v. 1, no. 9 (September 1913): 2.

³⁰ Thomas Bard Papers, Box 20A (Huntington Library); *Fresno Morning Republican*, October 10, 1912; see Franklin Hichborn, *Camouflage Organizations* (Santa Clara: privately printed, 1926) for a brief, muckraking account of the Tax Association of California.

buildings tax-free. Two farmers independently rebutted his editorial, however, pointing out that farmers who improved the land raised the value not only of their own land, but the value of nearby unimproved land as well. Yet speculators holding unimproved lands reaped the benefits both through lower property taxes and higher selling prices.³¹ Farmers as well as businesspeople in the Modesto area likewise supported the home rule amendment based on their early experience with land value taxation for irrigation districts.³² Despite such instances of farmer support for home rule and land value taxation, the voting record shows that rural counties voted two-to-one overall against both the 1912 and 1914 measures.³³ Since land values were rising rapidly during this period, the rural vote suggests that most farm owner-operators rejected the proposals because land value taxation would also mitigate their potential capital gains if and when farmland was sold.

In 1916, a new organization, the Los Angeles Single Tax League, took over the campaign. Dissension among single-taxers surfaced after the Joseph Fels Fund Commission and the Single Tax Conference held a joint meeting in San Francisco in 1915. The 1912 and 1914 California campaigns were the subjects of considerable discussion largely because philosophical purists objected to the Home Rule League's willingness to bend strict single tax principles to achieve a political end. Convention delegates finally resolved that "single taxers should . . . propose nothing less than constitutional amendments for the full measure of [a] state-wide single tax."³⁴ Shortly thereafter the Los Angeles Single Tax League was formed, and that organization drafted the 1916 ballot proposition, known as the land taxation amendment. Had it passed, which it did not, the land taxation amendment would have required public revenues to be raised by taxing land according to its unimproved value, although it would have permitted income and inheritance taxation for welfare purposes.³⁵

³¹ *PRP*, April 11, 1914, 442–443, and May 9, 1914, 546–547.

³² See *Transactions* (1914), 299.

³³ *Statement of the Vote*, 1912, 1914.

³⁴ *JFFB* 3, no. 8 (August 1915): 1, and v. 3, no. 9 (September 1915): 2.

³⁵ *JFFB* 4, no. 2 (February 1916): 1; *San Francisco Chronicle*, September 16, 1916; *Ballot Arguments*, 1916, 38–42.

An unmasked land value taxation proposition on the 1916 ballot provoked far more controversy than had the previous home rule propositions. The strongest opposition appears to have come from M.H. de Young, editor of the *San Francisco Chronicle*, who waged a one-man war against the single-taxers from 1916 until the ballot initiative movement finally ceased in 1922. De Young labeled single tax advocates as “atrociously dishonest” and “queer.” He called them “financial cranks” and, later, “socialists” espousing “pure Russian Bolshevism.” He repeatedly charged that single-taxers wanted to confiscate all land values with the result that the state would become the sole landlord.³⁶ De Young’s editorials aroused further public opposition, especially from the San Francisco and Oakland Real Estate Boards.³⁷

Single-taxers, for their part, claimed support for the 1916 land taxation amendment initiative from the State Federation of Labor, from some chambers of commerce, and from some agriculturalists. The Farmers’ Union appears to have supported the measure, as did a few Grange officials, although the State Grange as an organization did not support the proposal. With scattered support, at best, the ballot initiative garnered only 31 percent of voter support, suffering its worst defeat in the prosperous farming counties of Santa Clara and Orange, where the vote was four-to-one against the measure.³⁸

Land value taxation propositions appeared on the 1918, 1920, and 1922 ballots, but drew proportionately less of the vote each time.³⁹ Internal dissension, in addition to strong external opposition, appears to have contributed to the ultimate demise of the single tax campaign. In 1923, the Los Angeles Single Tax League retrospectively blamed defeat on “extremists, theorists, and doctrinaires,” meaning Easterners who imposed their ideas on the California campaign.⁴⁰ Although there is little evidence to suggest that a home rule amendment ultimately would have succeeded, discarding

³⁶ See, for example, his editorials in the *Chronicle*: August 16, 1916; October 13, 1916; October 24, 1916; July 1, 1917; January 10, 1919, September 11, 1920; and September 19, 1920.

³⁷ *San Francisco Examiner*, August 15, 1916, and October 8, 1916.

³⁸ *JFFB* 4, no. 9 (September 1916): 3; Bailey Millard, “Legislature to Consider State Land,” *Examiner*, June 18, 1916; *Statement of the Vote*, 1916.

³⁹ *Statement of the Vote*, 1918, 1920, 1922.

⁴⁰ *Tax Facts* 1, no. 10 (February 1922): 37–38.

the home rule strategy proved to be a fatal tactical error. Many erstwhile and would-be supporters were certainly lost once the measure appeared on the ballot as a land value taxation rather than as a home rule amendment. The striking reality, however, is that the campaign continued for six more years, surviving even the post-World War I Red Scare, when one would have expected any land value taxation proposal to meet a resounding defeat at the polls. But the 1920 initiative, oddly enough, received a larger affirmative vote than the 1918 initiative, although the overall margin of loss was greater.⁴¹

One is thus forced to ask what kept the single tax issue alive through six consecutive elections. The most obvious answer is that the 1910 separation of sources plan did not result in improved property tax administration at the local level. In addition, there was considerable popular support for breaking up large landholdings. Another possible reason the single tax initiatives enjoyed such a long tenure was that members of two state commissions found land value taxation arguments convincing, or at least useful for other reforms, and they kept single tax ideas before legislators while the single tax organizations kept propositions before the voters.

LAND REFORM THROUGH TAXATION

The State Tax Commission appointed in 1915 to investigate the shortcomings of the separation of sources system recommended, among other things, a graduated unearned increment tax to replace the real estate tax. As for agricultural lands in particular, the commission recommended that experts study California farm lands and classify them according to their inherent qualities and suitability for various crops.⁴² It further argued that agricultural land should, at the beginning, be assessed at full value, but that taxes on future increases in land values should fall heavier on unimproved or undeveloped lands. Despairing that “there seems to be no

⁴¹ *Statement of the Vote*, 1918.

⁴² California State Tax Commission, *Report*, 1917, 124. The idea of classifying agricultural lands was not new. The assessment commission of the National Tax Association (NTA) made a similar recommendation in 1911, but the goals of the two bodies differed greatly inasmuch as the NTA was urging more “scientific” assessment practices in an apparent attempt to mollify critics of the property tax; see *State and Local Taxation* (1912), 345–359.

other effective way of remedying or controlling the abuses which grow up through large land holdings,” the commission concluded that the graduated land tax “would at least bring about closer equity in the taxation of small and large land holdings.”⁴³ No legislation, however, came out of the commission’s recommendations, which also included complete separation of state and local revenues, centralized control of assessment, and adoption of a state income tax.

As part of the commission’s 1915 effort to determine public sentiment for a graduated unearned increment tax, it sent out questionnaires, of which over 600 were returned, to attorneys, bankers, educators, farmers and fruit growers, industrialists and manufacturers, merchants, newspapermen, physicians, public officials, and real estate/insurance brokers. Responses to two of the eleven questions are particularly revealing. To the first question, “Do you favor the gradual reduction of taxation upon buildings, trees, and vines and the assumption of that tax burden by the land?,” 355 responded “yes” and 215 responded “no.” Attorneys, newspapermen, physicians, public officials, and farmers and fruit growers generally seemed in favor of the idea; bankers seemed most opposed to it. To the second question, “Do you believe that land held for speculation should be taxed heavier than land used for home, agricultural or business purposes?,” respondents were evenly divided (285 to 285). Newspapermen responded strongly in the affirmative. Bankers and real estate/insurance brokers were firmly opposed, while farmers and fruit growers, as well as attorneys, were split. From the aggregate responses to all eleven questions, the commission could ascertain solid support for the increment tax only among newspapermen.⁴⁴

The second commission to be influenced by single tax ideas was the Commission on Immigration and Housing (CIH), established in 1913 at the urging of Governor Hiram Johnson and directed to study situations likely to arise with the opening of the Panama Canal.⁴⁵ The CIH, under the leadership of Simon Lubin, undertook several investigations in the 1910s, one of which was an exhaustive study of large landholdings in eight Southern California counties. Its purpose was to determine the effect that

⁴³ Tax Commission, *Report*, 1917, 128; see also *JFFB* 4, no. 7 (July 1916): 1–2.

⁴⁴ Tax Commission, *Report*, 1917, 156–161.

⁴⁵ Simon J. Lubin Papers, letters pertaining to the temporary commission, established in 1912, contained in Box 4 (Bancroft Library).

these landholdings had on the state's agricultural development and the corresponding economic welfare of California residents. In its 1919 report, the CIH charged that several hundred thousand acres of land, potentially tillable without irrigation, were in the hands of speculators who either offered parcels for sale at prices far beyond their productive values or were withholding land from sale until population pressures forced the market up to meet their speculative projections. To encourage owners to divest their holdings and make potential farmland accessible to buyers of limited means, the CIH favored a graduated land tax based on unimproved land values, rather than based on acreage, as the 1915–1917 tax commission had recommended. Equally important, the CIH urged the Legislature to declare a land policy designed specifically to increase the number of farmers. The commission further called upon the Legislature to coordinate all state agencies concerned with rural land and water issues.⁴⁶

The CIH recommendations were based, as were Mead's land settlement projects, then underway, on a vision of California agriculture dominated by small farming units, although the racist motives inherent in the land settlement experiments were absent. This was so because Simon Lubin's ideas permeated the 1919 large landholdings report. Lubin was the son of David Lubin, principal founder of the International Institute of Agriculture in Rome, and cofounder, with his brother-in-law Harris Weinstock, of the highly successful Weinstock Lubin department store — to which Simon fell heir. Before the younger Lubin took over the affairs of the company in 1906, however, he attended Harvard, graduating in 1903, and then spent three years as a settlement worker in Boston's South End House. The East Coast experience instilled in him a deeper understanding of complex immigration problems. Lubin had little time for those who advocated immigration restriction to solve mounting social and economic problems in urban areas. He was more than willing to leave immigrant protection,

⁴⁶ California Commission of Immigration and Housing, *A Report on Large Landholdings in Southern California, With Recommendations* (Sacramento, 1919); see especially 29–38. Although the various state agencies concerned with agricultural matters were organized under a new state Department of Agriculture in 1919, the reorganization was not the result of the Immigration and Housing Commission's recommendations. Moreover, land and water issues were placed outside the new department's purview, where such matters remain today; see Nash, *State Government and Economic Development*, Chapter 15, "Fostering Commercialized Agriculture."

education, and Americanization activities to others. For him the crux of the so-called immigrant problem was population distribution and gainful employment. From Lubin's perspective, the state's agricultural industry, designed to exploit rather than advance the immigrant laboring class, would greatly impede accommodating the immigrant influx anticipated when the canal opened. As Lubin pondered the vexing question of how to move immigrants into agriculture as farm owner-operators rather than as seasonal laborers, he was gradually attracted to single tax ideas and even carried on a brief correspondence with Joseph Fels.⁴⁷ The graduated land value tax the CIH eventually proposed offered the state a vehicle for stimulating the land market and creating land ownership opportunities for new immigrants.

The Commission of Immigration and Housing intended to follow its report with legislative proposals, but hostility from newly elected Governor Friend W. Richardson led the commission into controversy over a variety of matters that centered on one particular commission member, Paul Scharrenberg, secretary of the California State Federation of Labor and a strong supporter of Lubin's ideas. Lubin later wrote that "the time did not seem propitious" for introducing legislation. Continuing controversy, moreover, as well as threats of budget cuts or outright abolition, finally provoked Lubin to resign in 1923, after Richardson removed Scharrenberg from the commission, which thereafter became inactive.⁴⁸

LOCAL AUTONOMY IN PROPERTY TAXATION

The idea that agricultural lands could be classified for property taxation purposes slowly emerged from state tax and land policy debates between 1906 and 1920. This idea was tied to the separation of sources plan adopted in 1910, which supplanted the principle of uniform general property taxation with a hodgepodge of new taxes designed to tap corporate wealth. The new system undermined the fundamental precept of equity upon which uniform taxation rested and opened the door for a variety of special interest groups to influence the taxation of individual classes of property. From there it was but a short step to suggest that agricultural lands be classified

⁴⁷ Simon Lubin Papers, Box 4, letter of January 17, 1914, from Lubin to Joseph Fels.

⁴⁸ Simon Lubin Papers, Box 5, Folder 23.

so that real estate taxation might be used, in the interest of social equality, to effect indirectly a redistribution of land. Later, of course, advocates of differential taxation wanted land classification in order to prevent agricultural land from being parcelized and redistributed, so to speak, into residential subdivisions. But until 1920, some reform-minded Californians waged determined campaigns to break up large landholdings out of the belief that large landholders impeded not only the economic development of the state, but the social wellbeing of its inhabitants, or preferred inhabitants, as well.

Until 1920, many Californians believed that the state should formulate a rural land, and water, policy which would foster the growth of an agricultural industry based on small, highly diversified units. But whereas Elwood Mead successfully influenced legislation to experiment with state land settlement toward that end, single tax advocates never achieved such success. Their failure may be attributed to several factors. First, the long campaign to obtain some form of land value taxation, while never without considerable support, gradually polarized voters, which meant that any legislative proposal for tax reform based on single tax theory would be divisive and thus politically unwise. Second, and perhaps most important, farm groups were not among those calling for a state rural lands policy. Such calls came from elsewhere and they came at a time, moreover, when the agricultural economy enjoyed an overall prosperity that lasted into the 1920s.⁴⁹ The voting record reveals, moreover, that farmers were divided when it came to deciding whether land value taxation would ultimately benefit their personal interests.

Thus, by the early 1920s, a form of home rule that single-taxers had not envisioned was firmly entrenched in the state's property tax system. Unable to deal effectively with the problems of equalizing property tax assessment, the state abandoned the general property tax, as well as its problems, to local officials. The best efforts of single-taxers and sympathetic tax reform advocates failed to convince either a majority of voters or the Legislature to use the new locally controlled general property tax system to instigate a long-term land reform program, for which, in theory, there

⁴⁹ H. J. Stover, "Annual Index Numbers of Farm Prices . . . and Farm Real Estate Taxes, California, 1910-1935," Report #50, University of California Giannini Foundation of Agricultural Economics, 1936.

was considerable support. Between 1910 and 1920 the only changes that took place may be summed up briefly: the state defined some new classes of property from which it could derive revenue, and local governments inherited the revenue potential as well as the problems of the old general property tax system, problems that were destined to remain unsolved. In 1929, the state's policy of entrusting general property taxation to local control was joined by a similar state policy of entrusting planning matters to local control. Thus, by 1930, the framework for future land conservation policy matters had been set.

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Chapter 5

THE TENACITY OF PAROCHIALISM: STATE PLANNING, 1929–1959

The desire to reform California's rural society dissipated after Elwood Mead left the Land Settlement Board and Simon Lubin resigned from the Commission on Immigration and Housing. State, regional, and county planning efforts of the 1930s and 1940s were recurrent and intertwining responses to New Deal legislation and World War II demands. Although California suffered severe tax problems during the 1930s, tax and land issues rarely meshed in policy discussions at the state level as they had in the 1870s and 1910s. Large landholdings were by now accepted as an integral part of California's agricultural industry. Also, the agricultural sector no longer needed further development; rather, farmers needed to be rescued from economic distress and farmland from physical exhaustion. More people competing for a livelihood on the land hardly seemed the appropriate solution, and calls for the breakup of land monopolies were thus stilled. Yet land-use planning was discussed often during this thirty-year period.

THE COUNTIES

Soil conservation was the principal agricultural land issue of the 1930s, but those concerned with soil conservation were content to propose

mechanical solutions for treating immediate environmental problems: terracing, contour plowing, or grassland waterways to slow or reverse the adverse physical effects of soil erosion. In response to the federal Soil Conservation Act of 1935, California, like most states, passed corresponding legislation. The Soil Conservation District Act of 1938 left district formation to the discretion of agricultural landowners, who were authorized to petition county boards of supervisors to initiate proceedings. The state, through a Soil Conservation Committee serving “without compensation, at the pleasure of the Governor,” would provide districts only with limited advice and technical assistance.¹ The Soil Conservation District Act thus endorsed the technical approach to agricultural land-use problems and upheld agricultural land-use planning as a function of local governments.

Other planning developments likewise elaborated the home rule principle. The 1929 Planning Act required all counties to establish planning commissions and required each commission to develop and adopt a “comprehensive, long-term, general plan” for physical development. But the Legislature did not clearly define what a general plan should encompass. Instead, it permitted such plans to include conservation, land use, recreation, and transportation-related elements. Nor did the Legislature lay down specific procedures and criteria for implementing and administering county general plans. Between 1929 and 1937 only twenty-seven counties complied with the law and established planning commissions. Lacking clear definition of planning functions and procedures, counties were slow to develop land-use (and other) plans and even slower to adopt implementing zoning ordinances.²

Major amendments to the Planning Act in 1937 both broadened the definition of a general (or master) plan specifically to include land use, conservation, and transportation elements and delineated criteria for land-use

¹ *California Statutes*, 1938 (Extra Session), Chapter 7.

² California Office of the Director of Planning and Research, *California Reports on Planning* (Sacramento, February 1948), 19–20. See also Mel Scott, *The San Francisco Bay Area* (Berkeley: University of California Press, 1959), 199; William Spangle and Associates, Inc., “The Planning Law of California: An Analysis,” Report to California State Development Plan Program (Sacramento, 1965), 20–21. Before 1929, two local-level planning commissions were established in California: Los Angeles County formed its regional planning commission in 1925; San Francisco City and County formed a city planning commission in 1917.

and conservation plan elements. Under the 1937 amendments, county land-use plans were to be “an inventory and classification of natural land types and of existing land cover and uses, and comprehensive plans for the most desirable utilization of land.” Conservation plans were to guide “development and utilization of natural resources,” which included water, forests, soils, rivers, harbors, wild life, and minerals. In addition, conservation plans were to include “reclamation of land and waters” as well as “prevention, control and correction of the erosion of soils.” The legislative rhetoric fairly mimics the technical approach to soil conservation espoused by Hugh Bennett, chief of the U.S. Soil Conservation Service, who stressed utilizing each acre of agricultural land according to its physical capabilities.³ One can only conclude that the Legislature was responding to federal efforts to encourage agricultural land-use planning through voluntary, local-level soil conservation programs.

The 1937 Planning Act amendments, however, also gave county planning commissions and boards of supervisors a clear mandate for rural zoning. Cities and counties in California derive their power to zone from article XI, section 11, of the state Constitution, which reserves for local governmental units the right to control or supervise the property within their jurisdictions, but the 1917 Zoning Act set forth ordinance-implementing procedures for incorporated cities only. In 1925, Los Angeles County adopted a comprehensive zoning ordinance (the first county in the United States to do so) under the provisions of its home rule charter, which allowed the county to act independently. The 1937 amendments thus set forth, for the first time, procedures for adopting county zoning ordinances. These amendments, plus the 1938 Soil Conservation District Act, gave all county governments ample authority and adequate procedures to inaugurate

³ *California Statutes*, 1937, Chapter 665, especially Section 4. In his introduction to *Elements of Soil Conservation* (New York: McGraw-Hill, 1947), Bennett wrote: “Economic stability grows from good soil used intelligently. Wise use of productive land means protecting the land from impoverishing influences while under cultivation or grazing so as to keep it permanently productive. . . . To do this, many farmers need the technical assistance of soil conservationists.” For a short, but excellent introduction to Bennett’s tireless efforts in the field of soil conservation, see Peter Farb, “Hugh Bennett: Messiah of the Soil,” *American Forests* 66 (January 1960): 39–42.

locally controlled land-use planning for rural areas.⁴ Both complemented the policy framework set up by the 1929 Planning Act and established agricultural land-use planning as a county government function.

County planning commissions, however, tended to adopt zoning ordinances slowly, at best, and these were comprehensive only in the sense that they were loosely worded and, therefore, could be construed as all-encompassing. Santa Clara County, for example, adopted an “A-1,” or agricultural use, classification in the mid-1940s, but the ordinance, as written, permitted almost any land use. Farmer opposition, according to one source, prevented the Planning Commission and the Board of Supervisors from imposing a more restrictive zone. Between 1937 and 1947, when the State Conservation and Planning Act superseded the State Planning Act, twenty-four more counties established planning commissions, for a combined total of fifty-one of the state’s fifty-eight counties. Six counties had yet to comply with the law nearly twenty years after its adoption (San Francisco County is excluded since the city and county boundaries are contiguous). Of these fifty-one counties, only fifteen had adopted land-use plans, only one had adopted a conservation plan (Fresno County), and only twenty-six had adopted zoning ordinances.⁵

If county governments generally disregarded their responsibility to oversee rural land use during the 1930s and 1940s, the state compounded this neglect by failing to delegate clear lines of authority to local units. When the Legislature finally set up procedures for rural zoning in 1937, it followed the Planning Act amendments with the 1939 Uninhabited Territories Annexation Act, which gave cities priority over land-use decisions affecting rural-urban fringe areas. The future importance of the 1939 law was not immediately apparent, at least to county officials, but it eventually blocked county planning commissions and boards of supervisors from using the powers granted to them in 1937 when they were groping for legal

⁴ *California Statutes*, 1937, Chapter 665, Section 6.3: Ralph B. Wertheimer, “Constitutionality of Rural Zoning,” *California Law Review* 26 (January 1938): 179–180; Spangle, 21–22.

⁵ *California Reports on Planning*, 19–20; for brief information on farmers’ role in the 1940s “A-1” ordinance, see George Goodrich Mader, “Planning for Agriculture in Urbanizing Areas: A Case Study of Santa Clara County, California” (M.C.P. thesis, University of California, Berkeley, 1956), 34.

measures to control urban sprawl in the post–World War II era. In any event, by 1947 the newly established State Office of the Director of Planning and Research concluded that California suffered from “land-use lethargy” — that “zoning ordinances [had] been enacted in nearly every case only after the need for zoning became an absolute necessity, not to the planning commission but to property owners wanting to protect their land values” and to government officials attempting to correct “past mistakes.”⁶

THE STATE PLANNING BOARD, 1934–1943

While counties were slow to assume land-use planning responsibilities throughout the 1930s and 1940s, the federal government seemed all too eager to impose planning programs upon states during the New Deal. The threat of federal dominance led California to assert its governmental priority in planning policy beginning in the late 1930s. Between September 1933 and December 1934, forty-two states established state planning boards at the request of the Roosevelt Administration via the U.S. Administrator of Public Works, Harold L. Ickes. These boards were necessary to help coordinate federal public works programs. The National Planning Board (attached to the Public Works Administration), the Civil Works Administration (CWA), the Federal Emergency Relief Administration (FERA), and later the Works Progress Administration (WPA), which superseded the CWA and FERA, funded much of the work carried out by state boards. As a result, state planning programs during the 1930s came to be known derogatorily as “research for relief’s sake,” revealing the stepchild status which state legislators and state government bureaucrats attached to these boards.⁷

⁶ *California Reports on Planning*, 4. Observations by Richard S. Whitehead, member of the State Planning Board staff from 1937 to 1941 and Santa Barbara County planning director from then to 1969, corroborate the findings published in the 1948 report. According to Whitehead, Santa Barbara County commercial farmers consistently blocked the county’s attempts to establish an agricultural zone. It was not until after the Williamson Act passed in 1965 that the same farmers applied pressure for agricultural zoning so they could qualify for lower property taxes (interview with author, September 8, 1982).

⁷ National Resources Committee [superseded the National Planning Board], *The Future of State Planning* (Washington, D.C., March 1938), 3; Dorothy C. Tompkins,

In California, Governor James Rolph (Republican) appointed an eleven-member State Planning Board in January 1934. The National Planning Board assigned L. Deming Tilton to the board as a planning consultant in June 1934.⁸ Tilton began work on planning projects in October 1934 with the aid of about fifty FERA workers. In June 1935, the Legislature granted statutory authorization to the State Planning Board, establishing it as an agency under the Department of Finance, but the act carried no appropriation. The board was composed of five private citizens plus the directors of the state departments of finance, natural resources, and public works and had authority only “to cooperate” with organizations or other governmental units and agencies that might be “interested” in developing “the natural and economic resources of the State.”⁹

Governor Rolph died in office shortly after he appointed the State Planning Board, and while his successor, Frank Merriam,¹⁰ made no attempt to dismantle the board, neither he nor the Legislature made any attempt to use it, even in its limited advisory capacity. By late 1936, the planning staff still had no permanent quarters and Tilton had little or no formal access to other state departments, which would have permitted him to coordinate agency planning activities. The State Planning Board relied entirely on federal funds to carry out its research until Democrat Culbert L. Olson was elected governor in 1937. Then, in 1938, the Legislature allocated the board a modest \$12,500, increased the amount gradually to \$20,970 in 1941, but decreased it to \$16,000 in 1942, the year Olson left office.¹¹

Tilton, the guiding force behind the State Planning Board, took the agency’s research and fact-finding responsibilities seriously, even if

Recent Trends in State Planning and Development (Berkeley: University of California Bureau of Public Administration, 1949), 1-2.

⁸ Tilton received some of his early planning experience under Harland Bartholomew, in whose St. Louis office Tilton worked for a time, according to Richard S. Whitehead (September 8, 1982).

⁹ *California Statutes, 1935* (Extra Session, 1934), Chapter 331; National Resources Board, *State Planning: Review of Activities and Progress* (Washington, D.C., 1935), 21.

¹⁰ Lt. Governor Frank Merriam became governor in June 1934 and was reelected in November 1934, defeating Democratic candidate Upton Sinclair.

¹¹ National Resources Committee, *State Planning: Programs and Accomplishments* (Washington, D.C., December 1936), 4, 100; National Resources Planning Board, *State Planning* (Washington, D.C., June 1942), vii.

Governor Merriam and the Legislature did not. With respect to land-use planning, he directed the planning staff in a major study of tax delinquent lands, part of a National Planning Board–initiated program to identify privately owned land of sub-marginal productive capabilities so that the federal government could purchase such lands to bring them under better management. Tilton’s investigation revealed that, during 1936–37, the state held, as a “conservative estimate,” tax deeds to at least 2,500,000 acres of land. Not all of this land was rural and/or agricultural land; large areas were abandoned, cut-over forest lands, and vast tracts were lands that had been granted to Southern Pacific. Much of this land was considered suitable for private agricultural development subject to water availability.¹²

The investigation prompted the State Planning Board to make several recommendations to Governor Merriam concerning tax assessment and administration. In addition, the board used the study to design a plan, also presented to the governor, to “classify” all tax delinquent land deeded to the state in order “to determine its best ultimate use and ownership.” Under the plan, federal, state, and local agencies would cooperate in classifying land. Upon completing that process, the state would turn over to counties or cities the deeds to land determined to be “suited for private ownership.” Deed restrictions, where necessary, would attempt to “prevent irrigation districts from over-capitalizing and including more land than they c[ould] supply with water” or might require the new owner to “conserve and stabilize water supplies and extend soil conservation practices for the protection and perpetuation of existing agricultural areas.”¹³

The State Planning Board’s study and plan for rehabilitation of tax delinquent lands did not result in any legislative action,¹⁴ but it did provoke some interest from the Commonwealth Club, which studied the broad

¹² See Otis L. Graham, Jr., *Toward a Planned Society* (New York: Oxford University Press, 1976), 37–39, for information on the National Planning Board; Richard S. Whitehead (September 8, 1982) supplied information on Tilton’s role in the State Planning Board.

¹³ California State Planning Board, “Tax Delinquent Land in California: A Review of the Problem and a Plan for its Solution,” TS report, December 1938.

¹⁴ Article 2, Section 17 of the State Lands Commission Act (*California Statutes*, 1938 [Extra Session], Chapter 5) gave the commission authority to “classify any or all state land for its different, possible uses,” but Article 3, Section 31 of the same act stipulated that none of its provisions applied to “lands acquired by the state on sale thereof

topic of land-use planning throughout 1937 and 1938. When the club's Agriculture Section reported in 1938, it stated boldly that "programs for land classification, for land zoning, for government purchase of land and for the removal of the people from whole communities startle us." Clearly, this was not the Commonwealth Club of 1914–15 that prodded the state to embark on the land settlement experiments at Durham and Delhi. Rather, the Agriculture Section's report suggests that state-level attempts to stall federal land planning programs reflected a widespread unwillingness among business, agriculture, and civic leaders to oblige federal intrusion. The 1938 report as a whole, however, reflects confusion rather than a cohesive set of recommendations. The Agriculture Section actually seemed unable to reach any consensus regarding land-use planning. Instead, it cautiously recommended that the state give "careful study" and "careful consideration" to "all major new agricultural development ventures," to "past experiments in agricultural development," such as the Land Settlement Board experiments, and to "the nature and operation of planning agencies while they are still in the process of development." And despite its assertion that members were "startled" by land classification, zoning, and government purchase proposals, the section nonetheless supported the State Planning Board's plan for tax delinquent lands. The Agriculture Section also recommended that the state amend the 1937 Soil Conservation District Act to authorize "reasonable land use regulations" that would curtail "serious damage by soil erosion."¹⁵

By the 1930s, the Commonwealth Club had ceased to be the Legislature's principal citizen advisory body, but the club still maintained its tradition of studying and discussing major policy issues. The club also retained close ties with state legislators and government officials. Although its reports and recommendations no longer influenced legislation to the degree they once had, these reports still reflected policy issues seriously discussed among state leaders. The cautious tone of the 1938 land-use planning report indicates a climate of opinion favoring limited land-use regulations for agricultural land. It also reveals significant hostility toward dictating land-use planning policies to local units, especially if

for delinquent taxes." Several amendments were made to the State Lands Commission Act in 1939, but they did not expand its authority over tax delinquent lands.

¹⁵ "Land-Use Planning," *Transactions* 33, no. 5 (1938): 191–231, especially 201–205.

such policies accommodated national land planning goals. World War II soon intervened, however, and the State Planning Board turned its attention to studies for defense, housing, and industrial planning. As war-time exigencies demanded more of the board's time and energy, land-use planning disappeared from the agenda.

THE RECONSTRUCTION AND REEMPLOYMENT COMMISSION, 1943–1947

A state government bureaucracy dominated by agencies was not in keeping with the policymaking style that Republican Earl Warren brought to the governor's office when he succeeded to that post in 1943. Warren preferred instead to appoint citizen advisory groups to recommend legislation. This gave at least the appearance of state government responding to actual public needs and desires. Upon taking office, Warren's primary concern was to plan for peacetime recovery. Early in the year he sponsored two bills: one abolishing the State Planning Board and replacing it with a Reconstruction and Reemployment Commission (RRC), and the other establishing a \$33 million postwar employment reserve fund that was to be used to construct needed state institutions. Both bills easily and quickly passed the Legislature.¹⁶

The Legislature supplanted research-oriented planning with what might be called a public relations approach to planning when it passed the Reconstruction and Reemployment Act in 1943. The RRC's first annual report made it clear that the commission considered planning to be a function of state government only insofar as planning would allow the state to promote and coordinate industrial economic development through private enterprise.¹⁷ Unlike the State Planning Board, which functioned with a professionally trained director and staff, the RRC consisted entirely of state officials who, in turn, sat as the chairpersons for citizen advisory

¹⁶ Richard B. Harvey, *Earl Warren: Governor of California* (New York: Exposition Press, 1969), especially "The Citizen Advisory Bodies," 70–80; Lloyd Ray Henderson, "Earl Warren and California Politics" (Ph.D. dissertation, University of California, Berkeley, 1965), 158–159; *California Statutes*, 1943 (Extra Sessions, 1941–1943), Chapter 631.

¹⁷ California, Reconstruction and Reemployment Commission, *Report and Recommendations for the Period Ending December 31, 1944* (Sacramento, January 1945), especially 1–2.

committees. Warren appointed a businessman, Alexander R. Heron, as the executive director. Heron was qualified for the position by virtue of his previous government service experience as Director of Finance under Governor C.C. Young (1926–30), and as labor relations advisor for the federal War Production Board, but the only planner in the entire organization was Van Buren Stanbery, who served as chief of technical staff. Professional planners held no decision-making power in the new planning agency.¹⁸

Also unlike the State Planning Board, which had no resources to distribute, the RRC had millions of dollars to disburse to local governments on a fifty-fifty matching basis to stimulate local planning and help local governments acquire sites for public works and other improvements that would benefit the state as a whole. The League of California Cities acted as the agent through which the commission offered economic consultation to cities and counties applying for state funds. The RRC also boasted of “close cooperation” between it and the California Chamber of Commerce, the California State Federation of Labor, the state-level Congress of Industrial Organizations, the Pacific Advertising Association, the All-Year Club of Southern California (which promoted tourism), and the State Association of County Supervisors.¹⁹ With the state Reconstruction and Reemployment Act, California offered local governments, for the first time, the carrot of state funds to encourage local-level planning. It also established a bureaucratic structure that restrained the influence of professional planners and allowed local governments and citizen interest groups to shape state planning policies.

A major portion of the commission’s work consisted of making legislative recommendations generated by the citizen advisory committees. In effect, the RRC served as an official clearinghouse, sifting through the legislative requests of special interest groups. This resulted in a confusing array of legislative proposals submitted during the 1945 session, covering

¹⁸ *Ibid.*, organizational information on pp. ii–iv. Heron left his position as director of operations for the War Department’s Manpower Board in Washington, D.C., to accept the appointment as director of the Reconstruction and Reemployment Commission; see Henderson, 159–160.

¹⁹ Reconstruction and Reemployment Commission, *Report* (Sacramento, 1945), 6; Judith Norvell Jamison, *Coordinated Public Planning in the Los Angeles Region* (University of California, Los Angeles: Bureau of Governmental Research, Studies in Local Government, no. 9, June 1948), 130.

problems as disparate as providing medical care for children with cerebral palsy, organizing airport districts, securing unemployment insurance, and disposing of temporary war housing. Orderly land-use conversion to accommodate the war-induced population surge — people almost everyone expected to remain in California — did not figure among the concerns or legislative recommendations of the commission.²⁰

Economic planning dominated RRC activities from August 1943 to its dissolution in 1947. The commission responded to the needs as well as the whims of city councils, county boards of supervisors, chambers of commerce, industry, and labor unions. “Grass roots” planning is what the commission proudly called its efforts and accomplishments, which were considerable, but overall coordination was noticeably lacking. Through the myriad activities of the RRC, the state fully implemented the policy framework established by the 1929 Planning Act. By pumping millions of dollars to the local level to finance projects the RRC deemed worthy of public funding, the state accomplished three things. First, it kept intact the home rule principle of planning. Second, it encouraged local units to think of planning narrowly — in terms of civic projects and public works development. Third, and perhaps most important, it interrupted the federal–local level planning partnership that several New Deal programs had fostered. Nowhere was the latter accomplishment more apparent than in regional planning developments.

THE RRC AND REGIONAL PLANNING

Ironically, the economic development–oriented RRC, under Heron’s leadership, succeeded in reviving regional planning in California, a feat no doubt more attributable to the commission’s strong programmatic ties with local governments and special interest groups than to any philosophical commitment shared by commission members. The 1937 amendments to the State Planning Act included a mandate to the State Planning

²⁰ Reconstruction and Reemployment Commission, *Report* (1945), 81–116, and *Report and Recommendations for the Year Ending December 31, 1945* (Sacramento, January 1946), 25–44, and *Third Report to the Government and the Legislature* (Sacramento, January 1947), which recapitulates much of the information contained in the first two reports.

Board to divide the state into regional planning districts, defined as areas delineated by “natural physiograph[y]” and as “having mutual social and commercial interests.”²¹ The rhetoric might suggest that the Legislature intended to reverse the 1929 framework that left planning in the hands of local governments. In reality, however, the state was not so much concerned with planning as it was threatened by loss of power in the federal system.

Local events preceded state action. In 1935, planner Hugh Pomeroy, who had worked on the Los Angeles Regional Plan during the 1920s, was appointed to the state’s WPA advisory committee to coordinate professional and technical projects. He appreciated the assistance that regional planning bodies within states could provide to the WPA as it carried out its field surveys and research projects. More to the point, he realized that the WPA could stimulate regional planning, through the proverbial back door, by assigning federal workers to organized regional planning bodies. Pomeroy proceeded to experiment in the San Francisco Bay Area, where he succeeded in persuading Bay Area government officials to revive the spirit of the old Regional Plan Association, but the effort was short-lived. In September 1935, the San Francisco Metropolitan Area Planning Commission was organized, but with only counties represented. This, plus necessary reliance upon voluntary participation, made negotiations with the WPA difficult, and at times impossible.²²

Following Pomeroy’s unsuccessful attempt, the Commonwealth Club initiated, in 1939, another discussion of regional planning, this time in response to federal defense preparations. Military installations were suddenly rising all over the Bay Area without benefit of coordination on the state or regional levels. The club’s City Planning Section, under the direction of San Mateo County Planning Engineer Ronald L. Campbell, recommended the establishment of a provisional regional planning association, but the club took no further action toward that end.²³ By 1940, regional planning in the Bay Area appeared to have stalled.

The situation in the Los Angeles area was equally arrested. During the depression years of the 1930s the metropolitan planning network in Los Angeles County crumbled as more and more city planning commissions

²¹ *California Statutes*, 1937, Chapter 665, Section 2.2.

²² Scott, 231–232.

²³ “Regional Planning,” *Transactions* v. 37, no. 5 (1942): 167–196.

suspended activities. In response, the Los Angeles County Board of Supervisors curtailed the advance planning functions of the Regional Planning Commission. Nevertheless, federal relief and public works programs gave the commission new, and potentially more powerful, coordinative functions. City officials balked, however, when the Board of Supervisors tried to have the county designated as the official governmental unit to coordinate all public works in the area, mediating between the federal government and the cities and special districts encompassed by the county. Pressure from cities that wanted to negotiate directly with the federal government forced the county to abandon its effort.²⁴

During the 1930s, people of diverse persuasions could agree, in principle, that regional planning was socially beneficial. In practice, however, cities, and, to a lesser degree, counties sought chiefly to protect their powers and economies. By the late 1930s, state government powers were under siege. New Deal relief funds and public works projects had stimulated closer ties between Washington and local governments. Now federal funds for national defense threatened to strengthen those ties. State-directed regional planning provided a means by which the California Legislature could restore the state's position in the federal system. It is doubtful that Governor Olson and the Legislature deliberately sought, in 1937, to transform the State Planning Board from an unwelcome federal presence into a tentacle of the state police power. However, the amendments to the State Planning Act, which clarified county planning authority and procedures and which initiated statewide regional planning, are evidence that the state was attempting to reassert its dominance over local governments and yet reaffirm its 1929 commitment to local-level planning. Thus, county planning powers were immeasurably strengthened at the same time the state embarked on its first serious regional planning effort.

Counties might have changed the course of events if, during the 1930s, they had chosen to assert their legislated mandate in planning. Indeed, some professional planners hoped that counties would take the lead in land-use planning to counter an emerging trend in cities, many of which had distilled planning principles to zoning selectively in response to vocal commercial, industrial, or residential interests that sought to protect

²⁴ Jamison, 136–137.

their property rights. Such hopefuls stressed that planning's fundamental aim should be to secure "the most economically productive utilization of land."²⁵ Planner Hugh Pomeroy and others even anticipated that county supervisors and planning commissions would instigate so-called functional analyses to classify land for its potential and best uses (i.e., industrial, residential, agricultural, forest, mineral development, recreation) and to zone land according to such classifications well in advance of development. Even so, planners foresaw that countywide zoning probably could not be used "to regulate rural land uses in general" and thus advocated that any "major land use plan should leave undisturbed the traditional freedom of the open country except as scenic areas or traffic thoroughfares are involved or as nuisances may be concerned."²⁶ Those who saw the promise of county planning in the 1910s also had to admit that rural politics presented a major obstacle. In 1931, L. Deming Tilton, then director of planning in Santa Barbara County, noted, for instance, that the "county has never been especially hospitable to advanced ideas or to progressive policies" and that "county officials often shun the idea of assuming the legitimate responsibilities of government."²⁷

Thus, if the years 1937 and 1938 might have been a turning point, laissez-faire sentiments prevailing among county dwellers in general precluded county governments from assuming a leading role in land-use planning. One must also view this potential turning point in relation to California politics of the 1930s. Nominally Republican-dominated since the Progressive Era, state and local politics took on a partisan flavor during the 1930s, partly in response to the success of New Deal programs and partly in response to Upton Sinclair's controversial End Poverty in California (EPIC) campaign. When Democrat Culbert Olson assumed the governorship, California liberals inherited a long-awaited opportunity to reinstall a progressive spirit into state politics. Olson, however, never

²⁵ Albert G. Hinman, "The Economic Importance of Real Estate Classification," *Annals of the American Academy of Political and Social Science* [hereinafter cited as *Annals AAPSS*] 154 (March 1930): 15.

²⁶ Hugh R. Pomeroy, "County Zoning Under the California Planning Act," *Annals AAPSS* 155, pt. 2 (May 1931): 56–58.

²⁷ L. Deming Tilton, "Regulating Land Uses in the County," *Annals AAPSS* 155, pt. 2 (May 1931): 127–128.

enjoyed or cultivated solid support from the Legislature. Between 1937 and 1943, Democrats controlled the Assembly, while Republicans maintained control of the Senate. Olson, moreover, was a controversial figure, and his administration did not escape justifiable charges of favoritism and corruption. In 1942, the Republican candidate, Earl Warren, had no difficulty defeating the incumbent.²⁸

During Olson's administration, the State Planning Board received its first state funding and state recognition as a legitimate agency. Director Tilton nonetheless sensed the pitfalls of partisan politics. He and the board realized from the beginning that they would encounter tremendous local opposition, thereby jeopardizing the board's already tenuous existence if it carried out the 1937 mandate to divide the state into regional planning districts. Therefore, other than simply conferring new legal status on the Los Angeles Regional Planning Commission in 1939, the board took no action until 1941.²⁹

Proliferating defense installations in the Bay Area finally stimulated the State Planning Board to act more decisively. There, two aborted regional planning attempts signified some receptivity to the board's mandate. In March, 1941, the board held a hearing in San Francisco to take the first step toward creating a third Bay Area organization. Despite Tilton's claim that the board "didn't want to impose upon any group of communities a regional machinery if they didn't want it," the language of the 1937 statute directed the State Planning Board to design regional plans. The law also directed proposed regional planning bodies to implement those plans. When Bay Area cities and counties fully realized the board's intent, most reacted with indignation. The board retreated. Tilton restated its position in a December 1941 communication to Bay Area planning commissions. This time the board requested counties and cities to band together in a regional planning body that would be voluntary, temporary, and advisory.

²⁸ For a discussion of California partisan politics in the 1930s, see Michael Paul Rogin and John L. Shover, *Political Change in California: Critical Elections and Social Movements, 1890–1966* (Westport, Ct.: Greenwood Publishing Co., 1970), especially "The Resurgence of the Democratic Party in California," 112–152. For a sympathetic account of Governor Olson, see Robert E. Burke, *Olson's New Deal for California* (Berkeley: University of California Press, 1953).

²⁹ Jamison, 31, 38.

Reconsidered responses from Bay Area counties and cities were lukewarm at best.³⁰

Even wartime demands for intergovernmental cooperation could not persuade local leaders to moderate territorialism. Speaking in formal opposition to Bay Area regional planning before the Commonwealth Club in 1942, Fred S. Newsom, business manager of the *Richmond Independent*, stated that it was pure “illusion” to think that smaller governmental units could “follow this trend to centralization without penalty.” Regional planning, even advisory, as Newsom saw it, was but another step toward totalitarianism. It “would wipe out the individuality in cities . . . and counties . . . and states, to make them all of a pattern under a central government which begins by suggestion and ends by mastery.”³¹ The State Planning Board dropped the matter.

As the war progressed, however, local government officials and members of local chambers of commerce began to fear that regional cooperative measures would be necessary to avert a possible postwar economic depression. Thus, when the Legislature replaced the State Planning Board with the Reconstruction and Reemployment Commission in 1943, Heron succeeded where Tilton had failed: he cajoled the nine Bay Area counties into organizing a regional planning commission by allowing them to do so on their own terms.³²

In October 1943, the Bay Area Regional Development Council was organized. (“Development” was soon deleted from the official name.) Despite the council’s initial promise “to work for the progressive execution of a comprehensive, long-term general plan for the physical development of the region,” it was an organization dominated by Bay Area businessmen, not professional planners. The council really served as a clearinghouse for coordinating the planning projects of public and private agencies in the Bay Area. It acted, in addition, as a project advisory committee for the

³⁰ California State Planning Board, “Hearing on the Establishment of a San Francisco Bay Regional Planning District,” March 28, 1941, TS report; L. Deming Tilton, “A Regional Planning Organization for the San Francisco Bay Area,” TS of outline accompanying letter dated December 10, 1941, from Tilton to Oliver F. Campbell, chairman, Santa Clara County Planning Commission (SCCo Plan Dept: Improvement and Development: Regional Planning, San Francisco Bay Area Commission); Scott, 246–248.

³¹ “Regional Planning,” *Transactions* (1942), 187–190.

³² Scott, 261–263.

RRC. Although the council gave lip service to agriculture as one of the “four cornerstones of the area’s economy,” it had in mind no specific planning activities beyond preparing an areawide map of existing land uses, integrating the nine-county street and highway systems, and proposing a master airport plan.³³

As an example of the close ties that existed between the Bay Area Regional Council and Bay Area businessmen, the council and local chambers of commerce cosponsored a series of “Bay Area Days” in 1948. The first such event, staged in San Jose on May 21, paid tribute to industrial growth in Santa Clara County with an “inspection trip” to some of the new and/or expanding companies, such as International Business Machines and Food Machinery and Chemical Corporation. Luncheon speakers “placed emphasis on the need for Bay Area-wide planning and action” which might contribute “to the location of new industries and provision of increased employment.”³⁴ In 1947, regional planning, conceived and nurtured as metropolitan planning and development, remained confined to the Los Angeles and San Francisco areas. It was, moreover, the antithesis of regional planning as envisioned by those sympathetic to New Deal ideas. Nonetheless, it was entirely in keeping with state policy.

AGRICULTURE AND REGIONAL PLANNING

Agricultural land-use planning received no serious consideration as a necessary part of regional planning in either San Francisco or Los Angeles until the mid-1940s, when both urban areas suddenly started to spread out over larger geographic territories. Decentralization, as the new trend was

³³ Bay Area Regional Development Council, “Draft Proposed Constitution,” October 16, 1943, and “Amended Proposed Constitution,” January 15, 1944, and “Minutes” of January 14, 1944, meeting (SCCo Plan Dept: Improvement and Development: Regional Planning, S.F. Bay Area Council); Reconstruction and Reemployment Commission, *Report* (1945), 75–76 and *Report* (1946), 18–19; “Policy and Program: The San Francisco Bay Area Council,” n.d., and text of talk by Nestor Barrett on April 14, 1948, before the S.F. Bay Area Council, and “The San Francisco Bay Area Council” in *California Reports on Planning*, 31.

³⁴ “Press Release” issued for release on May 21, 1948, by S.F. Bay Area Council (SCCo Plan Dept: Improvement and Development: Regional Planning, S.F. Bay Area Council).

called, resulted from several factors in addition to accelerating population growth. One was the atomic bomb which many believed “imposed a dramatically new necessity for dispersion of those industries which are strategic and essential to the national defense.”³⁵ Expanding industries and corporations began, at the urging of chambers of commerce, to consider favorably the lower land acquisition and labor costs that smaller, regional centers offered. Improving transportation networks, in addition, made semi-rural living entirely feasible for people who wanted to retain their city jobs.

From mid-1946 to early-1948 the Commonwealth Club studied this new urban phenomenon. “Planned decentralization” was the course of action recommended by the club’s City Planning Section in a report vigorously debated by the membership. Despite reservations, members nevertheless supported, in principle, the planning and creation of “small ‘satellite’ cities limited in population by law to, say 35,000 to 50,000 inhabitants, set apart by permanent ‘greenbelts’ of farm or woodland areas.” The idea came straight from Ebenezer Howard and was carried to the club by Howard’s one-time protégé, F.J. Osborn of the British Planning Authority, who spoke on “Green Belt Cities” before the City Planning Section in November 1947. There is little indication that club members, however, seriously considered the greenbelt idea as anything more than an aesthetic means of establishing urban buffer zones, much the same as American city planners of the 1920s conceived of “garden cities.” Opponents of the greenbelt proposal maintained, moreover, that the state subsidies and tax benefits advocated to encourage planned decentralization were unconstitutional. They further warned that neither land developers nor business and industry leaders would ever submit to state-guided urban development.³⁶

Opponents of planned decentralization had little to fear. Legislators, who generally favored continuing the state’s role in planning, disagreed fundamentally over whether the governor’s office or the Legislature should control the planning agency. In 1947, despite acrimonious debate, the Legislature passed the Conservation and Planning Act, a sweeping piece of legislation which superseded the 1929 Planning Act, consolidated scattered

³⁵ “Decentralization of People and Industry,” *Transactions* 43, no. 1 (1948): 1-141.

³⁶ *Ibid.*

statutes and codes relating to planning, and created four new state agencies to carry out state-level planning. One of the four new agencies, the Office of the Director of Planning and Research (ODPR), replaced the Reconstruction and Reemployment Commission. ODPR was established under the governor's office, and the director was to be responsible for correlating the planning activities of all other state departments and agencies.³⁷

Legislators opposed to the Conservation and Planning Act denounced it as a vehicle for political patronage and balked at the \$116,000 appropriation the bill carried. They managed to delay passage until the last day of the legislative session, waiting until an alternate measure, which would have created a less powerful planning board with a smaller appropriation of only \$50,000, failed to pass. But in 1948, as the postwar economy stabilized, thereby undermining one of the supposed needs for state planning and research, political opponents succeeded in persuading the Legislature to eliminate ODPR funding.³⁸ In its short one-year existence, the office, under an acting director, A. Earl Washburn, nonetheless managed to research the status of city and county planning throughout the state, the first time any state agency had undertaken to assess how local governments were implementing the various state laws pertaining to planning.

As California's two major metropolitan areas stood poised to receive a postwar population influx beyond the fantasies of even the most enthusiastic chamber of commerce boosters, the state still clung to the home rule planning policy established in 1929. At the time, however, few observers sensed any real threat of chaos. Carey McWilliams, often critical of state government and politics, displayed an uncharacteristic lack of insight into the consequences of urban decentralization by calling it "planning by indirection." He apologized for "the giant adolescent," which "has been outgrowing its governmental clothes, now, for a hundred years," by merely

³⁷ *California Statutes*, 1947, Chapters 807 and 1408 respectively set forth the provisions of the act and created the Office of Director of Planning and Research; Chapters 868 and 869 amended the act to give city and county planning commissions a mandate for urban planning as distinguished from either city or county planning.

³⁸ *Sacramento Bee*, June 12, 1947; June 13, 1947; June 14, 1947; June 23, 1947; Thomas William Cohen, "The California Office of Planning and Research: Past Efforts; Future Possibilities" (M.C.P. thesis, University of California, Riverside, 1977), 3. See also *California Reports on Planning*, the one report to issue from the Office of the Director of Planning and Research.

noting that “the nature of the state’s population growth creates special resistances to large-scale planning.” McWilliams was optimistic that urban decentralization, “a natural and, from many points of view, a highly desirable dispersion of population,” would, somehow, solve the state’s physical planning problems.³⁹

It is more correct, however, to note that the troubled years of the Great Depression and World War II shattered the already fragmented planning visions obtained in the early decades of the twentieth century. If regional and rural planners were following different paths then, they had at least in those earlier years been able to mingle with government officials and businessmen as peers. By the early 1940s, civic and business leaders looked upon planners as technical assistants, at best, and, at worst, as bureaucratic obstructionists. Between 1929 and 1948, state policymakers reacted to events largely outside their control, events that generated economic, more than physical, growth problems. In the combined wake of depression and war, planning for economic recovery through industrial growth received increasing attention, and businessmen assumed greater authority in planning matters. Whatever cooperative spirit had once existed among planners, government officials, and business leaders disappeared in the troubled decades of the 1930s and 1940s.

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³⁹ Carey McWilliams, *California: The Great Exception* (New York: Current Books, Inc., 1949), 17–24.

Chapter 6

GIRDING URBAN SPRAWL WITH A SLENDER GREEN BELT

During the 1950s rapid population growth demonstrated that urban and rural land uses could no longer be treated as separate, unrelated phenomena. Terms such as “rurban,” “scatteration,” and, even more unwieldily, “metrural,” entered the popular lexicon, bespeaking an element of general confusion about how to define outward-creeping, problem-generating areas on the urban periphery. The word “fringe” took on new meaning to describe city boundaries which were ragged with suburban development.

Unprecedented, aggressive municipal annexation touched off an urban-versus-rural feud in California, confined, for the most part, to the San Francisco and Los Angeles metropolitan areas. Santa Clara County was the primary locus. There, municipal annexation to accommodate the unabated stream of westward bound migrants to the Bay Area in the post-war years escalated to intercity rivalry over territorial expansion. As cities snatched orchards and fields, farmers located on the ever-changing fringe retaliated by demanding greater zoning protection, which thus brought two state laws into conflict: the 1939 Uninhabited Territories Annexation Act and the 1937 Planning Act amendments which had given counties authority to establish rural zoning.

ANNEXATION ISSUES AND THE GREENBELT ACT OF 1955

Municipal land grabbing, under the guise of a rightful exercise of eminent domain, was the principal urban fringe land-use issue during the early 1950s. Local political controversies raged over municipal annexation; special purpose district organization, functions, and financing; and the fiscal as well as service responsibilities of overlapping local governmental units. In 1951, the State Legislature authorized the Assembly Committee on Municipal and County Government to study local governmental relations and municipal annexation problems in urbanizing, unincorporated areas. The Assembly defended such study as necessary since local governmental relations “had been made more difficult and complex by reason of the great growth in population of California and particularly growth in population and development in the unincorporated areas of the county.”¹ After holding hearings in five counties — Sacramento, Napa, Kern, Alameda, and Los Angeles — the Assembly committee recommended in 1951 that the state encourage voluntary joint city–county planning. It also recommended “a comprehensive program to zone all areas of the State according to their present or intended uses.”²

Meanwhile, during the 1953 legislative session, at least fifty-six Assembly bills would have amended, expanded, or reformed in some way the state laws governing city annexation powers.³ In an attempt to dispel the cloud of confusion arising from committee considerations over this assortment of bills, the Assembly resolved to hold an additional series of public hearings during the next interim period. The Committee on Municipal and County Government was again assigned to the task, and it held the

¹ California, *Journal of the Assembly*, v. 4, 1951 Regular Session, House Resolution No. 230, 6496.

² California Assembly, Interim Committee on Municipal and County Government, *Fringe Area Problems in the State of California* (Sacramento, March 27, 1953), 5.

³ California Legislature, *Final Calendar of Legislative Business* [hereafter cited as *Final Calendar*], 1953. No annexation-related bills were introduced in the Senate during the 1953 session. Fifty-six legislative proposals in 1953 compared to nine annexation-related bills introduced during the 1951 regular session; all were introduced in the Senate that year. The dramatic increase in the number of bills from 1951 to 1953 underscores the perceived severity of annexation problems in 1953.

first hearing in San Jose in November 1953 at the invitation of Santa Clara County government officials.

The Interim Committee, which considered its mission to be purely fact-finding, did not anticipate the emotional intensity enveloping annexation issues. Karl Belser, called upon to summarize the county view of annexation problems, noted that county land-use planning was often a futile exercise because “land use deals ha[d] completely subverted the planning and zoning regulations of the district.” Parcels annexed in self-descriptive “strips,” “fingers,” and “hooks” had rough-hewed Santa Clara County’s neat pattern of trim orchards which formerly stretched solidly across the landscape in variegated green and brown blocks. As a result, smaller communities undertook “incorporation in self-defense,” said Belser, a trend which only made the county’s job more difficult. The ultimate frustration, for him, was that both wildly expanding and self-defensively incorporating cities were using techniques “provided by [California] law,” which had been, he charged, “stressed and strained to the point of yield to accomplish the expedient purpose of the city.” California law, he concluded, rendered “overall planning on an area basis . . . practically impossible.”⁴

San Jose City Manager A.P. Hamann leveled the counterattack. He defended annexation, no matter how obtained, as “the only way cities or fringe areas can at the present time protect themselves from the evils [unsanitary sewerage and inadequate or non-existent fire and police protection] arising from the haphazard and unplanned growth and development.” Hamann admitted that, “as the laws are now written there is considerable confusion and doubt as to what they mean.” But his pro-city, pro-growth bias led him to complain that “there is no proceeding in which annexation opponents cannot find some technical ground upon which to contest the validity of an annexation.” San Jose and other expanding cities had, as a result, been subjected “to great cost and expense in defending their proceedings in court,” action which “delay[ed] and hinder[ed] the planning and orderly growth and development of the fringe areas.”⁵

⁴ *Journal of the Assembly*, v. 2, 1953 Regular Session, House Resolution No. 125, 3320; Assembly, Interim Committee on Municipal and County Government, *Proceedings, Meeting of the Subcommittee on Annexation and Related Problems, San Jose, November 20, 1953* (Sacramento, 1953), 16–17.

⁵ *Proceedings*, 21–22.

There were, in reality, several laws that gave overlapping planning authority to cities and counties. In addition to the 1939 Uninhabited Territories Annexation Act, which allowed cities to override county land-use plans and zoning ordinances, other state laws authorized the organization of special districts to meet community services in unincorporated areas without authorizing such special districts to levy charges to pay for some of these services. Another statute established 500 residents as the minimum required for municipal incorporation, thereby encouraging city formation in communities that would not likely be wealthy enough to provide adequate municipal services. Moreover, cities too often seemed willing to provide water supply and sanitation services, under contract, to unincorporated areas, thereby further discouraging counties or small, outlying communities themselves from assuming the responsibility of providing municipal services.⁶

The Assembly continued its study of urban fringe problems throughout the rest of 1953 and most of 1954, appointing two citizen advisory committees to help formulate legislative recommendations.⁷ The 1955 Greenbelt Act followed four years of study and intense debate over municipal annexation. Assembly Bill 2166, introduced by Santa Clara County Assemblyman Bruce F. Allen, was one of over sixty annexation-related bills proposed during the 1955 regular legislative session. The original bill would have restricted cities throughout the state from annexing lands zoned for exclusive agricultural use, but amendments made in the Assembly reduced implementation to only those counties that had, as of December 31, 1954, adopted master land-use plans including an exclusive agricultural zone classification. The amendment rendered the bill applicable only in Santa Clara County, which was the only county that could meet all the legal criteria.⁸ Allen introduced the bill at the behest of Santa Clara County farmers

⁶ Ibid., 6–7.

⁷ Karl Belser chaired the Northern California committee; Robert M. McCurdy, city manager of Pasadena, chaired the Southern California committee; Assembly, Interim Committee on Municipal and County Government, *Proceedings, Meeting of the Subcommittee on Annexation and Related Problems, Los Angeles, October 21, 1953* (Sacramento, 1953), 5, 52.

⁸ *Final Calendar*, 1955 Regular Session; Race Davies, “Preserving Agricultural and Open-Space Lands: Legislative Policymaking in California” (Davis: University of California Institute of Governmental Affairs, Environmental Quality Series, no. 10, June

and county government officials, and he could therefore afford to trade statewide for limited application and still serve his constituency without losing valuable support among his colleagues. When the bill was signed into law on July 6, 1955, moreover, it was to have effect for only two years.⁹

The 1955 Greenbelt Act authorized little more than a limited and localized experiment to restrict municipal annexation through the use of exclusive agricultural zoning, but it gave the Legislature more time to evaluate the strategy. In November 1956, the Assembly Interim Committee on Conservation, Planning, and Public Works heard testimony at a hearing held in San Jose since Santa Clara was the only county to invoke the law. Landowners as well as municipal and county government officials were invited to the hearing, which the committee hoped would help the Legislature determine whether agricultural zoning was a reasonable means to foster orderly land use change on urban fringes. Much of the discussion revealed continuing battles between city and city, and cities and the county. One farmer testified that he learned only from reading the legal notice in the local newspaper that fifteen acres of his cherry orchards had been annexed to the City of Sunnyvale. The spokesman for a group of fifty farmers near Cupertino further observed that farmers, like others, often behaved

1972), 64, 66; Rita M. Mize, "Interest Group Opinion and California Land Use Legislation" (Davis: University of California Institute for Governmental Affairs, Environmental Quality Series, no. 13, December 1972), 7. Los Angeles and Orange Counties also had amended their master land-use plans to include an agricultural land-use zone; see *California Reports on Planning*, 19, and Winston Crouch, Jack Goldsmith, Robert N. Giordano, *Agricultural Cities: Paradoxes in Politics of a Metropolis* (Los Angeles: UCLA Department of Political Science, 1964), 11–12. These were not, however "exclusive" agricultural zones; and since neither county chose the agricultural zoning route to control urban sprawl, it remains unknown whether the 1955 Greenbelt Act might have given such zoning laws greater force in Los Angeles and Orange counties during the 1950s.

⁹ *California Statutes*, 1955, Chapter 1712; Governor's Chaptered Bill File, Chapter 1712 (1955) (California State Archives), indicates that Governor Goodwin J. Knight received letters concerning AB 2166 from the State Board of Equalization, the State Department of Public Works, the County Board of Supervisors Association, the League of California Cities, the State Bar of California, the State Chamber of Commerce, and Mather Agricultural Council, as well as from assessors, tax collectors, and taxpayer groups. The letters, however, are not in the file; and the notation does not indicate which groups supported and which opposed the bill. This curious gap in the public record can only be offered as evidence that the bill was vociferously opposed, as former assemblyman, later judge, Brice F. Allen stated.

unpredictably in the midst of a chaotic situation. In 1955, these fifty farmers therefore signed an unusual pact whereby each agreed not to subdivide his land for four years.¹⁰

Municipal government representatives again defended their annexation policies and pointed the finger of blame at the county. While Sunnyvale's city manager admitted that his city's annexation policy had been "aggressive," he nonetheless charged that agricultural zoning had not been implemented as part of the county's master plan, which, incidentally, was not officially adopted until 1960, almost four years after the hearing. Another city representative announced that he and other city officials perceived exclusive agricultural zoning to be "more an annexation barrier than . . . a preserver of prime agricultural land." This, of course, was true: Santa Clara County used agricultural zoning to control the spread of urban development. But to cities, zoning was acceptable only so long as it served to separate commercial, industrial, and residential land uses within city limits. It was not acceptable when it interfered with a city's legal privilege to extend its boundaries to capture land attractive for industrial growth, necessary for airport expansion, or desirable for revenue-producing commercial and residential areas. Local tension over municipal annexation still ran high, and the Interim Committee concluded that a state agency was needed to "umpire conflicts between county and city land use plans."¹¹

Municipal annexation also inflamed politics in the farming areas of southeastern Los Angeles and northern Orange counties. Farmers in Southern California, however, chose to fight their battle entirely on the local level. Both counties had an agricultural land-use zone ordinance similar to Santa Clara County's, but farmers chose instead to incorporate farming communities as sixth-class cities (minimum required population, 500) zoned primarily for agriculture. The action began in mid-1955 after the city of Buena Park sought to annex, under the provisions of the 1939 statute, a strip of land upon which were located two dairies and two hog ranches. The owners of these properties managed to stall the effort with a lawsuit, but realized that their move only gave them a temporary reprieve.

¹⁰ Assembly, *Interim Committee Reports* 13, no. 14 (1955, 1957), "State Greenbelt Legislation and the Problem of Urban Encroachment on California Agriculture," 34, 56.

¹¹ *Ibid.*, 34–35.

Working through the local Farm Bureau, Orange County farmers successfully launched, in May of 1955, an incorporation drive that culminated in October, when Dairyland was officially designated a city, initially comprising “650 people, 13,000 cows, and 60,000 chickens.” In August, 1955, dairy and poultry farmers in southeastern Los Angeles County initiated a similar incorporation movement, which, after several months of controversy over whose land should be included, left the existing City of Artesia boxed in on three sides by the new City of Dairy Valley, incorporated in April 1956. The third agricultural city, Dairy City, later renamed Cypress, also came into existence in 1956 after agricultural landowners located south of Dairyland gathered forces in October 1955 and followed the lead of their compatriots to the north.¹²

A California Farm Bureau spokesman noted with pride that these three cities were, for all intents and purposes, Farm Bureau cities, since the mayors, members of the city councils, and practically all the residents belonged to that organization. He furthermore predicted that “cow towns,” as he called them, were the answer to the state’s urban encroachment problems.¹³ While these events may have helped to sustain the State Legislature’s attention on municipal annexation problems, incorporating farms into agricultural cities did not, in the long run, prove any more effective than invoking the Greenbelt Act. Landowners on the urban fringes in Southern California, too, assumed the dual identity of farmer and land speculator. It was inevitable that some would sell, initiating the process that unraveled these loosely woven agricultural cities.

The Commonwealth Club, still an arena for vigorous debate in the 1950s, declared that “annexation of farm lands by competing cities for long-range future growth ha[d] developed into intercity warfare.” In May 1955, the Agriculture Section began a two-year study of agricultural zoning. This group comprised more than 100 representatives of farm organizations, government bodies, businesses, and university-based agricultural specialists; and, from 1955 to 1957, it heard thirty speakers address every possible aspect of agricultural zoning. Agricultural economists, soil scientists, planners, tax assessors, state engineers, legislators, local government

¹² *California Farm Bureau Monthly* [hereinafter cited as *CFB Monthly*] (September 1955): 9; Crouch, et al., *Agricultural Cities*, 17–19, 50–53.

¹³ *CFB Monthly* (August 1956): 9–10.

officials, farmers, and developers were invited to appear before the group. Despite exhaustive study, however, the Agricultural Section did not reach a clear consensus. Although a slim, but solid, majority endorsed agricultural zoning, a vocal minority criticized it as “a device to avoid urban planning by substituting agricultural land freezing,” as a sure means of “walking into the trap of the policy state,” and as a legal strategy that made it “comfortable for an obstructionist to prevent the growth and development of our city.”¹⁴

The furor over agricultural zoning and municipal annexation reached its peak during the 1957 legislative session, when nearly forty annexation-related bills were introduced. Senator John A. Murdy (Orange County), Assemblyman Bruce Allen, and Senator George Miller (Contra Costa County) introduced bills that would have extended and expanded the Greenbelt Law. Only Allen’s bill passed into law after it was reduced to a simple extension of the 1955 act. It once again made the Greenbelt Law applicable only in counties where exclusive agricultural zoning had been adopted prior to December 31, 1954.¹⁵

From 1959 to 1965, municipal annexation and agricultural zoning received continued, but dwindling, legislative attention. During the 1959 regular session, for example, only slightly more than twenty municipal annexation bills were introduced in both houses. As the confusion subsided, the interest group positions became clearer. In 1961, Senator Robert Lagomarsino (Ventura County) revived the attempt to expand the Greenbelt Law to any county with a master plan that included an exclusive agricultural zone classification, regardless of adoption date. His measure was sponsored by the CFBF on the recommendation of the Ventura County Farm Bureau. The bill failed, but in 1965, Lagomarsino succeeded in obtaining a statewide Greenbelt Act. Again, the CFBF sponsored the bill. To secure its passage, however, Lagomarsino and the CFBF agreed to amendments that rendered the bill’s provisions nearly harmless to any city wishing to annex agricultural land. In 1959, the Legislature upheld cities’ power to annex land under the 1939 Uninhabited Territories Act. Now, encountering stiff opposition from the League of California Cities, the Ventura

¹⁴ “Is Agricultural Zoning Necessary in California?” *Transactions* 52, no. 5 (March 1958): 69–86.

¹⁵ Legislature, *Final Calendar*, 1957 Regular Session; Davies, 66–67.

County senator agreed to amend the bill by inserting a provision giving cities a three-mile limit within which they could annex land zoned for agricultural use. Although the County Supervisors Association, the CFBF, and the Agricultural Council of California supported the amended bill, the 1965 Greenbelt Act left untouched the problematic urban fringe.¹⁶

In retrospect, it is easier to see what was not so perceptible at the time: that the rural (agricultural zoning) versus urban (municipal annexation) battle waged in the State Legislature from 1951 to 1965 originated in 1917, when the Legislature gave counties a mandate to adopt rural zoning. Although the state intended to encourage county level land-use and conservation planning, it gave farmers, who controlled county governments, a weapon they later used against rapidly expanding cities. Then, when the Legislature passed the Uninhabited Territories Annexation Act in 1939, it gave cities a procedural expedient that some city officials later used to carve up the countryside in their rush to stake claims for future expansion. Once cities appreciated the muscle of the 1939 act, they guarded their power jealously. Given the strength of the organizations representing rural and urban interests in Sacramento, the California Farm Bureau Federation and the League of California Cities, the rift was bound to end in a stalemate.

STATE LAND-USE PLANNING AND LAND CONSERVATION: RECAPITULATION

In 1953, Karl Belser addressed a special meeting of Bay Area planners and civic officials who were gathered to discuss industrial growth in the San Jose area. Belser, while serving on Detroit's planning staff during World War II, had witnessed the political, economic, and social chaos attending the sudden location of armaments factories in that city. Thus, when Ford Motor Company announced its plans for a huge assembly plant near Milpitas, Belser foresaw a similar situation developing in Santa Clara County. He nonetheless optimistically depicted the county as "one of the few remaining areas left in California" where planners could develop a "new pattern" for orderly growth which would preserve a healthy, integrated economic base built upon strong industrial and agricultural sectors. The "problem," he concluded, "[wa]s to

¹⁶ Legislature, *Final Calendar*, 1959, 1961, and 1965 regular sessions.

find a way to develop that planning.”¹⁷ Belser, a relative newcomer to planning in California in 1953, did not realize how difficult it might be to coordinate city, county, and state planning activities. The postwar population explosion also created a greater need for professionally trained planners, who were emerging from the planning schools that began to appear in abundance in the late 1940s and early 1950s. Cities and counties clearly needed professional expertise to plan for future transportation, school, sanitation, and recreation needs. Urban versus rural political conflict, however, exacerbated the problems of planners who, moreover, had no real agency support within the state government. Impending chaos on the local level led these professionals to rejuvenate a long-standing effort to create a central state planning agency; but they and their supporters were never able to reverse the fragmented nature of planning laid down as state policy in 1929. From 1948, when the Office of Planning and Research lost its funding, to 1951, the state had no active, general planning agency. Then, in 1951 the Legislature rejected a bill that would have empowered the State Planning and Conservation Board to investigate state resource needs and recommend appropriate legislation to the governor and the Legislature. It passed instead a weaker bill that authorized the board to “cooperate with any interested persons or organizations in devising means to develop the natural and economic resources of the state.” The measure carried no allocation, but it did authorize the board to accept federal or state grants to carry out its planning functions, such as they were.¹⁸ Under these provisions a state agency could once again engage in planning if it could find willing partners among other state agencies or local planning bodies and if it could secure federal or state grants to fund those activities. Like the old State Planning Board (1934–43), the Planning and Conservation Board had the power only to react to or facilitate the planning activities of other governmental bodies. But this time no federal funds were immediately forthcoming and no federal agencies funneled down planning suggestions.

The Legislature maintained the status quo on the issue of state planning during the mid-1950s while the Assembly Committee on Conservation, Planning, and Public Works studied the failures of past state planning

¹⁷ *San Jose Mercury*, June 5, 1953.

¹⁸ Legislature, *Final Calendar*, 1951 Regular Session; *California Statutes*, 1951, Chapter 334 (SB 1091). See also *Statutes*, 1951, Chapter 1545 (SB 1085), which continued the State Planning and Conservation Board.

efforts. Interim hearings conducted in 1955, 1956, and 1957 resulted in several committee reports, the most important of which, with regard to agricultural land use, was the 1957 report, *State Greenbelt Legislation and the Problem of Urban Encroachment on California Agriculture*. After three years of study, however, the committee could only recommend that the Legislature continue the Greenbelt Act and, in addition, establish a “state agricultural lands commission” to “conduct a two-year investigation of the impact of urbanization on California agriculture.”¹⁹

The agricultural lands commission never materialized; but in January, 1958, the Assembly Committee on Conservation, Planning, and Public Works held another interim hearing to study the need and public desire for centralized state planning, especially as such planning might affect the use and disposition of agricultural lands statewide. The committee also asked the legislative counsel to prepare a summary of state planning activities. The counsel’s research staff found that of about thirty-five state agencies then engaged in physical planning of some sort, only the Planning and Conservation Board had a general planning mandate. And the board did nothing more than set policy for the Department of Finance, which functioned as a clearinghouse for county and city planning agencies seeking federal planning grants. The Planning and Conservation Board, via the Department of Finance, could be considered a central planning agency only insofar as it was the body that determined how federal planning grants would be disbursed.²⁰ So-called state planning in 1958 was therefore, not much different from state planning in 1951 or 1947 or 1929. Parochial planning was the only planning in California; any coordination among state, regional, or local planning agencies was purely voluntary.

That being the status of state planning in 1958, the Assembly Interim Committee solicited public opinion concerning the need for and the desired responsibilities of a centralized planning agency, particularly as such an agency would guide land-use planning. The hearing witnessed professional planners and the League of California Cities express mutual support for a central, research-oriented, advisory planning body. Both groups agreed that a state agency should coordinate state projects, make broad

¹⁹ Assembly, *State Greenbelt Legislation*, 11.

²⁰ Assembly, Interim Committee on Conservation, Planning, and Public Works, *Proceedings, Fresno, January 24, 1958*, 1-3, 5-7.

projections that would serve as a guide, and disseminate information to local planning agencies. In other words, they envisioned the ideal state planning agency as one with broad supervisory, but no regulatory, powers.²¹

Farmers and farm organization representatives, on the other hand, clearly considered planning to be the province of local governments. Some felt that, at best, a state agency should perform a limited advisory function. In other words, this group favored maintaining the status quo in state planning, which is to say no direct state involvement. The hearing revealed two things. First, a new generation of professional planners was drifting closer to its predecessors' old ally, the League of California Cities — a drift that would eventually reaffirm planning's urban bias. Second, some of the farmers who forced the issue of agricultural land preservation upon the State Legislature had second thoughts about the wisdom of their actions once they confronted the urban bias and centrist goals of state planning advocates. For instance, Roy A. Nunn, president of the Tulare County Farm Bureau, firmly stated that the 4,100 Farm Bureau families he represented "in no way endorse . . . State planning at this time."²²

Objections from rural areas notwithstanding, in 1959, Senator Fred Farr (Monterey County) introduced and secured passage of a bill that replaced the State Conservation and Planning Board with a new State Office of Planning (SOP). According to Farr, the bill emerged from the Assembly Committee on Conservation, Planning, and Public Works (which conducted the January 1958 hearing in Fresno). The committee drafted the bill "in collaboration with the League of California Cities and the County Supervisors Association, the Departments of Public Works, Water Resources, and Natural Resources, all of whom strongly supported the bill before the Legislature." Farm support was conspicuously missing, but Farr nonetheless claimed that the bill encountered "virtually no opposition during the session."²³ The new statute authorized the State Office of Planning to develop a comprehensive general plan for the development of the state, but it did not give the office any regulatory power. Despite fears that

²¹ *Ibid.*, especially 96, 102, 154.

²² *Ibid.*, 59.

²³ *California Statutes*, 1959, Chapter 1641 (SB 597); Governor's Chaptered Bill File, Chapter 1641 (1959), letter dated June 23, 1959, from Senator Fred Farr to Governor Edmund G. Brown plus miscellaneous letters.

the new planning agency (which later became the State Office of Planning and Research, or OPR) would centralize administration and regulation of planning at all levels, the office was once again tucked away in the Department of Finance and given only advisory functions. And once again, the Legislature refused to allocate funds. It was not until 1962, with the aid of federal funds, secured under the provisions of Section 701 of the 1954 Housing Act, that the SOP undertook investigations designed to provide the necessary data from which a general state plan could be developed.²⁴

With a \$375,000 federal grant, the SOP began what it titled the State Development Plan, a four-year project that was to be completed by March 1966, after which time the director of finance and the governor were to make policy recommendations to the Legislature. Between mid-1962 and mid-1964, an agricultural study team amassed data on the trends and characteristics of California agriculture with respect to population, employment, farm size and number, farm income, value and volume of farm production, and land availability. Its findings, presented in 1964, led the SOP to “refute the hypothesis that California agriculture [wa]s imperiled by an imminent shortage of prime land. The position [that agriculture was imperiled] is tenable only if one assumes that the advancement of agricultural technology will not continue.”²⁵ Such conclusions surely dashed the hopes of those, like Karl Belser, who looked to the creation of a state planning agency to help implement a program for conserving agricultural land. It was clear that the SOP would respond to the need for state land-use planning only when the agricultural sector as a whole was threatened by the loss of arable land.

Senator Farr also authored the 1959 Open Space Act (aka Scenic Easement Act). Modeled after an easement bill that William H. Whyte co-authored for the Pennsylvania State Legislature, Farr and State Planner William Lipman drafted a bill that, in its original form, would have given

²⁴ Thomas Cohen, “The California Office of Planning and Research: Past Efforts; Future Possibilities” (M.C.P. thesis, University of California, Riverside, 1977), 4–6; Frederick G. Styles, “A Progress Report on Regional Planning in California” in J. Herbert Snyder, ed., *The Role of the County in Regional Planning: Proceedings, Third Annual Institute on Regional Planning* (Davis: University of California, University Extension, 1964), 37–38.

²⁵ California, Department of Finance, State Office of Planning, *California Agriculture* (May 1964), especially p. 40.

the state the authority to acquire easements on properties which, for public interest reasons, were desirable as open space. Amendments, however, removed this provision from the bill. As passed by the Legislature, the Open Space Act enabled cities and counties, but not the state, to acquire temporary or permanent development rights to real property by gift, legal agreement, or expenditure of public funds to preserve “open spaces and areas.” Open space was defined in the bill as land that had “significant scenic or esthetic values, which areas and spaces if preserved and maintained in their present open state would constitute important physical, social, esthetic or economic assets to existing or impending urban or metropolitan development.”²⁶

Thirty years of discussion, experimentation, and legislation had not appreciably changed state policy regarding planning, especially for rural, agricultural areas. State planning laws had been consolidated, and, as of 1959, there seemed to be general agreement that a state agency was necessary to coordinate various forms of planning being carried out at municipal, county, and regional levels. This policy was designed, in part, to keep the federal government from usurping state powers, but the basic premise embodied in the 1929 Planning Act remained unchanged. The 1937 Planning Act amendments, the 1955 Greenbelt Act, the 1959 act creating a second State Office of Planning, and the 1959 Open Space Act reaffirmed the state’s commitment to vesting local units with regulatory power over planning and conservation matters.

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²⁶ William H. Whyte, *The Last Landscape* (Garden City, N.Y.: Doubleday and Co., 1968), 84–85; *California Statutes*, 199, Chapter 1658.

Chapter 7

PREFERENTIAL TAXATION AND THE CONSERVATION OF LOCAL AUTONOMY

Land-use planners embraced zoning as an effective means to preserve agricultural land and control urban growth, but agriculturalists generally disliked the idea. Many farmers viewed any move toward state land-use regulation as a threat to their private property rights and the value of their farm assets. Although some Farm Bureau members embraced zoning, the California Farm Bureau Federation endorsed the idea only when it was coupled with tax relief measures. The federation, in addition, worked to ensure that Farm Bureau members were seated on or monitored local planning commissions wherever agricultural zoning was adopted.

CFBF AND TAX POLITICS: 1927–WORLD WAR II

Because the California Farm Bureau Federation represented a sizable percentage of landowners in the state, it is not surprising that it followed tax policy closely. In 1927, the CFBF established a Tax Research Department, later called just the Research Department, to counter the influence of the newly incorporated (1926) California Taxpayers' Association (CTA), which first appeared in 1916 as the Taxpayers Association of California (TAC). The CTA ostensibly represented homeowners seeking to reduce public expenditures

and thereby reduce property taxes. However, the Taxpayers Association of California had gained some notoriety as the political arm of public utility, railroad, and other large corporations which influenced legislation protecting their interests. In 1921, the TAC dissolved, but its principal supporters allegedly reorganized under various other names: the Tax Investigation and Economy League, the Better America Federation, the People's Economy League, the Greater California League, the California State Irrigation Association, and the California Development Association. Through these organizations, a handful of powerful corporations, most notably Southern Pacific Railroad, Santa Fe Railroad, Southern California Edison, and Pacific Gas and Electric, worked chiefly to defeat legislative proposals, which, among other things, would have raised their property taxes.¹

Rightly perceiving that agricultural interests were not represented and possibly were jeopardized by the CTA, the CFBF formed its own research and political action arm to “devote its energies to determining how in fairness to all groups, tax levies may be most fairly and justly levied against the property of the people.”² Von T. Ellsworth, an agricultural economist, became the department's first and most influential director, a post he held until 1961. During his thirty-four years with the CFBF, he and his staff researched state tax problems and tax-related issues affecting California's corporate and unincorporated agricultural industry.

The full range of the Research Department's activities is beyond the scope of this study, but after 1935 the range expanded to include legislative advocacy for all agricultural industry-related issues, including labor relations, voluntary health insurance, pest control, livestock and produce inspection and grading, water and soil conservation, and agricultural research in relation to extension work. Tax issues nonetheless commanded the department's attention each year, and research now focused more specifically on equalizing intracounty property tax assessments rather than on securing broader changes in the tax system. From the department's inception,

¹ Franklin Hichborn, *Camouflage Organizations* (Santa Clara: privately printed, 1926).

² California Farm Bureau Federation [CFBF], *Minutes and Reports* [hereafter cited as CFBF, *Minutes*], v. 8, Resolutions Adopted by 8th Annual Meeting, November 17–19, 1926 (N.B.: The bound volumes of CFBF *Minutes* housed in the federation's headquarters in Sacramento contain overlapping pagination schemes. Consult the table of contents found at the front of each volume.).

Ellsworth stressed that only farmer involvement at the county level would make its work truly effective; and by 1930, thirty-two county farm bureaus had established tax committees. They primarily monitored county budgets to keep local expenditures and property taxes as low as possible. Local oversight work became routine during the 1930s, but more serious taxation problems occasionally beckoned attention. In 1930, for instance, the Research Department surveyed agricultural property taxes in the Los Angeles area after the California Real Estate Association, the Association of Building Owners, and the Association of California Title Companies agreed to cosponsor state legislation designed to establish a maximum county tax upon urban or subdivision property. Agricultural property owners in the Los Angeles area organized in concert because property values rose wherever the city was expanding; and a coalition of realtors, building owners, and title companies was, in effect, forcing farmers to bear the burden of paying for urban services in county-governed areas.³

The Great Depression slowed urban growth, and the tax limitation effort subsequently waned in Los Angeles. During the 1930s, tax delinquencies loomed as the larger problem. As government expenditures at all levels increased, it became necessary to increase revenue as well as broaden the tax base. The earlier property tax problems did not vanish, however. They reappeared when the building pace resumed in the late 1930s. In 1937, citrus growers in Los Angeles County requested assistance from the Research Department when they were informed that the assessed value of their properties would increase between 15 and 25 percent. After some investigation, the Research Department persuasively argued that the increase was unwarranted, and the county rescinded the increase.⁴

In 1937, the Research Department also prepared a major report on county assessment rates at the request of a State Assembly interim committee appointed in 1935 to study assessment and appraisal methods and practices.⁵ The CFBF report contained a county-by-county tabulation of assessment rates for properties situated inside and outside municipal boundaries in the years 1926, 1928, 1930, 1932, and 1934. The tabulation showed

³ CFBF, *Minutes*, v. 12, Annual Report cited above.

⁴ CFBF, *Minutes*, v. 19, Annual Report of Research Department and Report on 1937 State Legislation, 19th Annual Meeting, November 16–18, 1937.

⁵ Assessment *rate* is the ratio of assessed value to estimated market value.

that both rural and municipal assessment rates were uneven, sometimes markedly so, from county to county, but no pattern of consistent underassessment of either urban or rural properties unfolded. Intercounty assessment rates, however, fluctuated widely between 1926 and 1934, revealing that property was assessed at anywhere from 25 to 70 percent of its market value depending upon the county in which it was situated and the year in which it was assessed. Based on these findings, the CFBF recommended “greater centralized control over county assessors . . . [and] penal[ties] for according preferential treatment to certain forms of property.” Real estate interests argued for changing the law to require assessment on the basis of rental value rather than market value; and tax assessors argued for codifying existing tax laws and professionalizing tax administration.⁶

Post-World War II population growth and industrial development created major public finance problems, which ultimately embroiled the CFBF in intercounty property tax issues. Rapid growth translated into greater sales tax and personal income tax receipts, which mainly benefited the state. Cities and counties, however, were strapped to meet increasing expenditures for police and fire protection, and the sanitation, transportation, and recreation services required by the influx of people. Concern over mounting county and city finance problems prompted the Legislature to undertake, in 1945, a thorough study of state and local taxation. Property tax assessment and administration turned out to be a problem of major significance statewide. During the 1930s, assessed valuations dropped considerably, causing a corresponding drop in property tax receipts for cities and counties. Public finance also became more complex after 1933 changes in the state tax code rescinded the separation-of-sources principle that had governed tax administration as all levels of government struggled to cope with the economic crisis. Under the so-called Riley-Stewart Plan, the state returned public utility property to local property tax rolls, which helped to offset the loss of revenue resulting from decreased valuations. But property tax exemptions, particularly veterans’ exemptions, which increased dramatically after World War II, effectively nullified the broadened property tax base. In addition, the state retained the option of reimposing a state ad valorem general property tax on top of

⁶ California, *Journal of the Assembly*, 52nd Session (May 18, 1937), 3092–3113 (quote, 3102).

local property taxes. As a result, assessors tended to hold assessed valuations low to protect the tax base for local revenue. Cities and counties thus raised tax rates to squeeze more revenue from property. Cities also resorted to other taxes, especially municipal sales and business license taxes, to generate more income. Counties, in contrast, became more reliant on shared revenue sources, such as the motor vehicle fuel tax; subventions, especially for aid to the elderly; and state and federal grants. Between 1930 and the early 1940s, the structure of public finance changed dramatically.⁷

There was, moreover, little uniformity among property tax assessment rates, procedures, and practices at the county level, despite State Board of Equalization attempts between 1935 and 1938. Lack of uniformity presented the state with particular problems during the 1940s when pressure mounted for the state to reduce taxes or to return some of its burgeoning surplus to financially strained local governments. Veterans' property tax exemptions were a chief target. As veterans' tax exempt claims and dollar amounts rose, local units called upon the state to reimburse them for loss of property tax revenues. Disparate county assessment practices, however, precluded any rational system of redistribution.⁸ Veterans' exemptions were only part of the problem. School finance, which depended on multiple revenue streams, and public utility property, the value of which was assessed by the State Board of Equalization but was subject to taxation at the prevailing rates in situ, complicated tax administration. As of 1944, the state contained 4,809 separate taxing districts whose boundaries overlapped to the extent that the state board had to keep track of over 8,000 tax code areas.⁹ The paperwork was staggering. Clearly, the time for standardization was at hand.

In 1947, The Senate Interim Committee on State and Local Taxation recommended that the Legislature extend State Board of Equalization

⁷ California Senate, Interim Committee on State and Local Taxation, *Report, Part I: Summary of Findings and Recommendations* (Sacramento, 1947), 10–17, and *Part II: State and Local Government Finance in California* (Sacramento, 1947), 179–196, 373–384.

⁸ *Ibid.*, *Part II*, 349–351; California, State Board of Equalization [hereafter cited as SBE], *Annual Report, 1948–49* (Sacramento, 1950), 5–6; see also CFBF, *Minutes*, v. 28, Ellsworth's summary of comments he presented to the Senate Interim Committee on October 15, 1946, in *Annual Report of Research Department and Report of 1946 Legislation*, 28th Annual Meeting, October 26, 1946, and *Minutes*, v. 30, *Annual Report of Research Department*, 30th Annual Meeting, November 15, 1948.

⁹ SBE, *Biennial Report, 1943–1944* (Sacramento, 1945), 24.

powers. Heretofore the board had authority only to equalize assessments by raising or lowering the entire assessment roll of any county. The committee recommended authorizing the board to raise or lower assessment within counties among various classes of property. The Legislature complied with this recommendation, and in the same year, the board was ordered to begin a study of county assessments for equalization purposes. When Von T. Ellsworth reported on this legislation at the 1947 annual CFBF meeting, he cautioned Farm Bureau members “to be watchful to assure application of fair principles in the administration of this new law.” Modifying legislation in 1949 also required the Board of Equalization to adjust public utility property assessment rates with local rates.¹⁰

The State Board of Equalization as well as the Senate thus began careful study of the state’s property tax system. The Senate Committee on State and Local Taxation subsequently discovered that from 1940 to 1949 county assessment rates ranged from 14.8 to 50.9 percent, figures based on the selling prices of 752 properties in thirty-two counties. The median rate was about 25 percent; however, a wide discrepancy existed between the assessment rates of rural and urban properties. In 1946, rural property was assessed at an average of 13.5 percent of its appraised value, while the comparable figure for urban property was 32.8 percent. The Board of Equalization made similar discoveries. Its preliminary study revealed, moreover, that the board was assessing public utility property at a higher rate than counties generally assessed farms. Equalization orders would, without doubt, require higher assessment of farm property.¹¹

THE PREFERENTIAL TAX MOVEMENT

The California Farm Bureau’s reaction to the Board of Equalization’s preliminary findings was swift and strong. At the 1950 annual meeting, the

¹⁰ Senate, Interim Committee Report, *Part II*, 87–97, 389–394; CFBF, *Minutes*, v. 29, Annual Report of Research Dept. and Report of 1947 Legislation, 29th Annual Meeting, October 14, 1947; *California Statutes*, 1947, Chapters 663 and 1523; *Statutes*, 1949, Chapter 1466.

¹¹ Senate, Interim Committee on State and Local Taxations, *Report, Part III: State and Local Taxes in California; a Comparative Analysis* (April 1951), 505–506; Steven P. Arena, *History of the California State Board of Equalization; The First One Hundred Years, 1879–1979* (Sacramento: SBE, 1980), 72.

membership adopted a resolution reiterating a commitment to the “uniform assessment of all taxable property within any taxing governmental unit,” but demanding that “tax rates [be] adjusted downward as assessed valuations . . . increased.” The resolution placed Ellsworth in an awkward position. Having spent more than twenty years trying to establish credibility as a professional economist in the political arena, he was unwilling to undermine his reputation and the tenuous support of other interest groups by presenting such a patently political demand before the Legislature. His dilemma impelled him “to bring the matter directly and forcefully” to the attention of the CFBF Board of Directors. He asked the board to consider its position with care, arguing that a policy favoring those farmers with underassessed property would ultimately split the membership. Ellsworth’s blunt honesty produced a change of heart. At the next annual meeting, the membership adopted an alternative resolution. The demand for lower tax rates disappeared, and in its place, the Research Department was directed to continue studying “the various aspects of the assessment problem.”¹²

The Research Department thus urged county units to monitor closely the budget proposals of their respective county governments. Expenditures of particular concern to Farm Bureau members were those proposed for sanitation facilities and other urban services required by increasing populations in unincorporated county areas. As early as 1948 Santa Clara County and Orange County Farm Bureaus sought Research Department assistance to argue for financing such improvements through general obligation bonds and user fees rather than increased property taxes. After 1948, the CFBF continually pressed the Legislature to pass laws requiring urban fringe property owners to pay taxes and fees according to the benefits they derived from county-provided services.¹³

Meanwhile, Ellsworth, apparently still under pressure to seek preferential tax treatment for farmers, devised a compromise plan. In May 1954, he outlined for CFBF officers a short-term variable rate method to achieve

¹² CFBF, *Minutes*, v. 31, Resolutions Adopted at 31st Annual Meeting, October 3, 1950; *Minutes*, v. 32, Supplement D, Final Report on 1951 Regular Session Legislation, August 22, 1951; *Minutes*, v. 33, Supplement E-3, Tax Section Minutes, November 14, 1951.

¹³ CFBF, *Minutes*, Annual Reports and Tax Section Minutes cited above in vols. 30, 32, and 33; *Minutes*, v. 34, Supplement C-4, Report on Tax Section, November 11, 1951; *Minutes*, v. 35, Supplement E-5, Minutes of the Tax Section, November 19, 1953.

equalization over a period of years. By using this method, he explained, counties with low assessment rates would not be forced to increase them. Instead, downward adjustments would apply to state-assessed properties, namely public utilities, and commensurate adjustments would be made in state apportionment formulae for schools to offset possible reduced local property tax revenue. The variable-rate method, he cautioned, would not keep rates on underassessed farm properties down forever, but it would give local Farm Bureau tax committees more time to influence fiscal frugality among county governments and thereby forestall the full impact of equalization.¹⁴ Ellsworth's plan was designed to hold together the CFBF's broad membership, but it had little appeal for legislators.

From 1948 through 1953, the State Board of Equalization, through its Division of Assessment Standards, surveyed the assessment practices of every county in California. Results were published in separate county reports which detailed then-current procedures and outlined recommended procedural changes plus personnel, equipment, and budget requirements necessary to bring practices up to a minimum standard. By 1950, the board could report that over one-half of the county assessors were in the process of acquiring or updating maps and building records to undertake reappraisals, and possibly reassessments. County supervisors, however, were often slow to grant budget increases so that assessors could carry out their new state-imposed responsibilities thoroughly and quickly.¹⁵

Although there was scattered resistance, there was no widespread, organized local opposition to upgrading the tools and procedures used by county assessors, and most taxpayers understood that housecleaning was long overdue. In reality, county assessment offices and practices were antiquated. Assessors' reports revealed that property in some counties had never been completely appraised; most assessors' maps were wholly outdated; few counties had any system for identifying taxable properties other than the descriptions recorded on deeds; and many counties had

¹⁴ CFBF, *Minutes*, v. 35, Supplement K, Reports of the Research Department to Mid-Year Meeting, House of Delegates, May 25, 1954; California Senate, Interim Committee on State and Local Taxation, *Report, Part II: The Taxation of Personal Property in California*, January 1955, 58, which carries the only excerpt from Ellsworth's testimony.

¹⁵ SBE, *Annual Report 1948-49*, 6-7 and *Annual Report 1949-50* (Sacramento, ca. 1950), 7-8.

no building permit ordinance, meaning that improvements could only be ascertained by visual inspection. Some evidence suggests, moreover, that farm property was usually the last class to be reappraised, assuming that a county even required regular reappraisal.¹⁶

In August 1954, the State Board of Equalization finally acted, ordering fourteen counties to raise their locally assessed values so as to bring the assessment level of each of the state's fifty-eight counties to between 20 and 30 percent of market value. Twelve of the fourteen counties were predominantly rural in character: Butte, Del Norte, Humboldt, Imperial, Marin, Mariposa, Mendocino, San Bernardino, San Luis Obispo, Sonoma, Stanislaus, and Tulare. The other two, Alameda and Contra Costa, experienced rapid development during the 1940s. Although none of the counties was pleased with the order, only Tulare County refused to comply. When *People v. Tulare County* (45 A.C. 341) came to trial in December 1954, the court ruled in favor of the county on technical grounds. The State Board of Equalization chose not to appeal the court's decision.¹⁷

The board's quiet retreat might have prompted other counties to file suits, but that did not happen. A 1964 study by economist Bruce T. McKim revealed, surprisingly, that assessment valuation protests to county boards of equalization actually decreased from 1956 through 1961, even though property tax levies had increased since 1946 more rapidly in California than in any other state. Closer scrutiny of assessment valuation protest data, however, led McKim to conclude that the decrease masked serious flaws in the appeal process. Specifically, while county boards appeared to be increasingly sympathetic to taxpayer protests, those who owned high-value property stood a much greater chance of prevailing before a board than did others.¹⁸ This finding suggests that small-farm owners had little reason to perceive county boards of equalization as reliable allies. Rather than waste time and money seeking tax reductions via the direct appeal route, they chose political action as their method of protest.

¹⁶ California, SBE, *Papers Presented at 1952 Conference, County Assessors of California and State Board of Equalization* (Sacramento, 1952), 59–68, and *Papers Presented at 1953 Conference* (Sacramento, 1953), 65–90.

¹⁷ SBE, *Annual Report 1954–55*; 5–6; Arena, *History*, 72.

¹⁸ Assembly, Interim Committee on Revenue and Taxation, *Taxation of Property in California; A Major Tax Study, Part 5* (Sacramento, December 1964), 286, 302–305, 310, 314.

In November 1954, Ellsworth spoke before the State Association of County Assessors to ask that assessors “go rather slowly in adjusting assessments to a higher use value.” He also hinted that the CFBF was then considering two legislative advocacy positions. One position called for “all property [to] be zoned” and then “evaluated or assessed for tax purposes based upon its earning power in its existing zoning classification.” The second recalled the shift from corporate property taxation to corporate gross receipts taxes. This stance called for property tax assessment based simply upon “current earning power in [a property’s] existing use.”¹⁹

Ellsworth’s remarks suggest that the CFBF might have pushed for a gross receipts tax to replace the property tax on agricultural land. But the CFBF ultimately came out in support of differential property taxation. In 1956, the CFBF membership resolved to seek legislation requiring farmland taxation solely on the basis of agricultural productivity; and, in 1957, the federation sponsored a bill, introduced by Senator George Miller, Jr. (Contra Costa), calling for preferential assessment of farmland. After amendments were added, the measure called for special assessment of land zoned for exclusive agricultural or recreational use with “no reasonable probability of the removal or modification of the zoning restriction within the near future.”²⁰

The Miller Act unanimously passed both houses, but the vote is slightly misleading. The attorney general warned that the bill would be declared unconstitutional on the basis that even though “the California Constitution authorize[d] the Legislature to create various classes of personal property, there is no . . . constitutional authorization for special classification of real property which must, therefore, be assessed in proportion to its value.”²¹

¹⁹ Von T. Ellsworth, “A Farmer Looks at Taxes” in SBE, *Papers Presented at 1954 Conference* (Sacramento, 1954), 193–203; Ellsworth’s own summary of his comments before the conference, as published in the *California Farm Bureau Monthly* (January 1955), 18, contains reference only to the suggestion that property assessment be “based on current earning power in its existing use.” He made no mention of agricultural zoning.

²⁰ CFBF, *Resolutions Adopted at the 38th Annual Meeting*, November 15, 1956 (pamphlet distributed to membership); CFBF, *Minutes*, v. 36, Annual Report of the Research Department and Legislative Actions, 36th Annual Meeting (1955); *CFB Monthly* (May 1961): 11; *California Statutes*, 1957, Chapter 2049.

²¹ Memorandum from Ernest P. Goodman, deputy attorney general, to Governor Goodwin Knight, Governor’s Chaptered Bill File, Chapter 2049 (1957). Ronald B. Welch

The California Supreme Court had just reaffirmed this principle in *De Luz Homes, Inc. v. County of San Diego* (1955) by ruling that the term “full cash value” meant market value.²² Thus, extremely doubtful constitutionality gave legislators an opportunity to support a popular cause knowing that the law would never be implemented.²³ The scenario evolved just so: Governor Goodwin Knight signed the bill, and the attorney general duly ruled the Miller Act unconstitutional.

Still, even if some legislators had voted conservatively as strict constitutionalists, the bill probably had enough support to pass. In 1955, Assemblymen Francis Lindsay and Bruce F. Allen independently introduced legislation proposing use-value assessment for agricultural lands, although neither bill ever got out of committee hearings. The constituency behind Lindsay’s bill is unknown, but Allen intended his bill to bolster the 1955 Greenbelt Act. Santa Clara County farmers who pressed for exclusive agricultural zoning naively expected County Assessor Hayden Pitman to recognize zoning classification as a legitimate criterion in determining assessed valuation. But Pitman was one of the few county assessors who actively supported intercounty equalization. He refused to consider exclusive agricultural zoning as a determinant of value, arguing that any type of zoning reflected political pressure brought to bear by special interests who were responding to market forces. Thus, the market, not zoning, determined value. Pitman did not stand alone: the County Assessors’ Association and the State Board of Equalization also took this position. The

of the SBE was one of those who disagreed with the attorney general. Welch believed that only the words “within the near future” (in the Miller Act) violated the Constitution. Article 13, section 1 required that real property be assessed in proportion to its value. Although “value” had been *defined* as “full cash” or “market” value since 1922 (in accordance with a California appellate court ruling in *Wild Goose Country Club v. Butte County*), in practice, property tax appraisals were sporadic and assessment rates varied so widely as to render “in proportion to” virtually meaningless.

²² *De Luz Homes, Inc. v. County of San Diego*, 45 Cal.2d 546 (1955).

²³ Race D. Davies, “Preserving Agricultural and Open-Space Lands: Legislative Policymaking in California,” Environmental Quality Series, no. 10 (Davis: University of California Institute of Governmental Affairs, June 1972), 23, 63; Rita M. Mize, “Interest Group Opinion and California Land Use Legislation,” Environmental Quality Series, no. 13 (Davis: University of California Institute of Governmental Affairs, December 1972), 10.

CFBF emerged as their counterforce and lobbied on behalf of both Allen's and Lindsay's bills.²⁴

Provisions of the 1955 Greenbelt Act left it to expire in two years, which put agricultural zoning lobbyists back in Sacramento in 1957 to push for an extension. In the meantime, Maryland passed (1956) the first state law requiring preferential taxation of farmland. Negotiations between zoning and preferential taxation forces in California were thus virtually inevitable. Zoning advocates wanted legislation that would also provide tax breaks for agricultural landowners. The CFBF, for its part, was suspicious of, but not yet hardened against, zoning. As a result, the two interest groups merged forces, and both the second Greenbelt Act and the Miller Act easily passed the Assembly and the Senate. Despite the attorney general's ruling on the Miller Act, the legislative course had been set, and the next several years witnessed the triumph of preferential taxation over zoning and agricultural land-use planning.

Although a few individual farmers and some taxpayer groups questioned the motives of those who sought to wed agricultural zoning and use-value assessment,²⁵ the CFBF now lent its unqualified support to the

²⁴ Davies, 24; SBE, *Property Tax Assessment, Santa Clara County* (Sacramento, 1951), especially 33–39, 41. See also an unpublished address given by Welch before the Sacramento Mother Lode Supervisors' Association meeting on June 4, 1964, "Agricultural Zoning and Assessment of Farm Land" in which he reviewed the shortcomings of the 1957 Miller Act as perceived by assessors (located in California State Library, Government Publications). Pitman was a member of the Executive Committee of the County Assessors of California Association (CACA) during the early 1950s. He also served as the chairman for a joint SBE/CACA committee that drafted the 1956 Monterey Agreement, the purpose of which was to revise equalization procedures and techniques that many county assessors found objectionable in order that intercounty equalization could proceed; see SBE, *Papers Presented at 1956 Conference* (Sacramento, 1956), 1–11. Even when the Miller Act passed, but before it was ruled unconstitutional, Pitman announced that he would not ignore proximate urban development when assessing farmland, regardless of zoning, a position generally supported by the CACA (see *San Francisco Examiner*, September 15, 1957, Peninsula Section).

²⁵ A rice grower, for example, attending a discussion on agricultural zoning and preferential taxation sponsored by the Commonwealth Club, charged that farmers who favored such legislation were simply seeking a "tax dodge" (*Transactions* 52 (1958): 82–83); the president of the Stanislaus County Taxpayers' Association questioned whether agricultural zoning would give county assessors unwarranted power to determine land-use planning policies (Assembly, Interim Committee on Conservation, Planning,

idea. Robert Hanley, replacing Von T. Ellsworth as the CFBF's legislative representative, stated before a meeting of citrus growers that the "Farm Bureau has for many years supported the theory that land should be assessed on the basis of current use rather than potential use."²⁶ Hanley thereby revealed how selective the federation's collective memory was once it found a policy that had wide appeal among its many members. Advocating preferential tax treatment for land zoned agricultural use allowed the CFBF to serve without contradiction those farmers who wanted to remain in farming and those who wanted to sell to developers.

Although the Miller Act failed the constitutional test, two years later a legislative measure designed to establish use-value assessment for nonprofit golf courses quietly passed both houses of the Legislature. Assemblyman Alan Pattee of Monterey County introduced ACA 29 during the 1959 session; and after the measure passed the Legislature, California voters approved the referendum in 1960. Considering that Pattee was a member of the Assembly Committee on Agriculture and that, during the 1959 session, he also introduced an unsuccessful bill (AB 1860) proposing preferential assessment for agricultural land, the golf course tax amendment may have been designed, in part, to test voter sentiment for use-value assessment.²⁷

Encouraged by the success of the golf course amendment, advocates of preferential assessment for agricultural land launched a major legislative effort. Three such measures were introduced during the 1961 session,

and Public Works, *Proceedings, Fresno, January 24, 1958*, 119). These are only two of many remarks delivered at public hearings on the issue; they are cited not because they are typical but because they are intelligible. All too frequently those who appeared to testify at public hearings simply wanted to vent their feelings, usually hostile, without stating clearly their objections.

²⁶ As reported in *CFB Monthly* (November 1957): 2.

²⁷ Legislature, *Final Calendar*, 1959 Regular Session; California Constitution, article XIII, section 2.6, adopted November 8, 1960, read:

In assessing real property consisting of one parcel of ten acres or more and used exclusively for nonprofit golf course purposes for at least two successive years prior to the assessment, the assessor shall consider no factors other than those relative to such use. He may, however, take into consideration the existence of any mines, minerals, and quarries in the property, including but not limited to oil, gas, and other hydrocarbon substances.

Section 2.6 was repealed in 1974 and replaced in the same year with section 10, an almost identical provision.

but only Assemblyman Paul Lunardi's ACA 4 passed both houses to find a spot on the November 1962 ballot as Proposition 4. The measure was designed to amend the state Constitution to allow use-value assessment of agricultural land only if the property had been in agricultural use for two years prior to the new assessment and if the owner would agree to keep the land in agricultural use for a minimum of five years.²⁸ Lunardi's bill marked the first time that the restrictive covenant, rather than agricultural zoning, was advanced as the control mechanism that might make preferential assessment acceptable to a majority of voters.

Inasmuch as Paul Lunardi replaced Francis Lindsay as the Sixth District assemblyman in 1958 and both were leaders in bringing preferential assessment before the Legislature, it is reasonable to assume that both were responding to constituents' demands. The Sixth District, therefore, requires some discussion. In terms of geographical area, it is vast, covering ten counties during the late 1950s, eleven during the early 1960s: Alpine, Amador, Calaveras, El Dorado, Inyo, Mariposa, Mono, Nevada, Placer, and Tuolumne (Lunardi also represented Yuba County). None of these counties was experiencing rapid urban growth. All were sparsely populated, and the majority of real property was assessed as rural. Yet none of these counties was a major agricultural county, and agricultural pursuits were largely confined to stock ranching and fruit growing. Thus, one would characterize the Sixth District as rural, but not heavily agricultural. It is therefore puzzling why Sixth District constituents sought preferential taxation on agricultural land.

Data compiled by the State Board of Equalization suggest that the preferential tax movement, at its inception, was a rural-based effort to hold the line on property tax increases. Several Sixth District counties were exceptionally slow to comply with intercounty equalization efforts. When the State Board of Equalization began issuing equalization orders in 1955, the statewide assessment ratio for all types of property was 22.1 percent and rural property average assessment ratios were generally lower. In 1962, the overall statewide ratio was still 22.1 percent; the overall rural property assessment ratio only 20.8 percent.²⁹ Disaggregated calculations for 1960–62

²⁸ Legislature, *Final Calendar*, 1961 Regular Session.

²⁹ Senate Fact Finding Committee on Revenue and Taxation, *Report of the Committee, Part 9: Property Taxes and Other Local Revenue Sources*, (Sacramento, March 1965), 39.

rural property assessment ratios indicate, furthermore, that assessors in twenty counties were making little attempt to equalize rural assessments with those on other types of property in their own counties. Seven of these twenty counties lay in the Sixth Assembly District.³⁰ The data thus suggest that the preferential tax movement gained initial strength among rural property owners in sparsely populated Sierra Nevada counties. Agriculturalists in these counties most likely were stock raisers or fruit growers. Urban real estate market forces were not increasing assessed valuations on their property, but State Board of Equalization efforts were or soon would. The board's efforts, moreover, came at a time when exemptions were seriously eroding local tax bases. Veterans' property tax exemptions, for instance, which accounted for the largest dollar loss, rose almost 62 percent from 1954 to 1962. Church exemptions increased by almost 189 percent, educational institution exemptions rose 199 percent, and welfare exemptions increased 325 percent.³¹

Proposition 4 proved to be controversial. Many tax assessors opposed the referendum, and State Board of Equalization member Richard Nevins even coauthored the negative argument in the voter pamphlet. Among other things, Nevins argued that preferential assessment of agricultural lands would encourage "tax-sheltered" land speculation and ultimately force higher tax assessment on private homeowners, business, and industry.³² But Nevins' board

³⁰ *Ibid.*, 48, 107; SBE calculations appearing on these pages are coefficients of dispersion, which show to what extent individual assessments vary from the average. A zero coefficient of dispersion indicates absolute uniformity of assessments among all types of property on the secured role. High coefficients of dispersion indicate increasingly less uniform assessments. These calculations are not entirely reliable inasmuch as they are based on a stratified sampling of assessments. Nevertheless, the State Board of Equalization generally considered a coefficient of dispersion figure of 50 or above to indicate assessment problems due to internal practices rather than external market forces. The 20 counties with coefficients of dispersion at 50 or greater were, in ascending order, Butte, Riverside, Alpine, Del Norte, Tuolumne, Siskiyou, Amador, El Dorado, Yuba, Lake, Solano, Sierra, Nevada, Kings, Inyo, Imperial, Santa Barbara, Fresno, Madera, and San Bernardino.

³¹ *Ibid.*, calculated from figures which appear on p. 63. Between 1954 and 1962 veterans' exemptions increased from \$48,786,000 to \$75,738,000, church exemptions from \$6,786,000 to \$19,481,000, college exemptions from \$3,253,000 to \$9,728,000, and welfare exemptions from \$5,823,000 to \$24,761,000.

³² California Secretary of State, *Ballot Arguments*, General Election, November 6, 1962, 9–11.

colleague, George R. Reilly, disagreed. Reilly argued that “if the increase in value of farm lands can be slowed down or stayed for a reasonable period of time” with a policy of preferential taxation buttressed by a “vigorous” policy of agricultural zoning, then a farmer might “continue his agricultural pursuits” and “support the governmental services required by the urban community.”³³ Another State Board of Equalization official, Ronald B. Welch, found it impossible to predict the voter outcome. On the one hand, he noted that public sentiment seemed to favor replacing the traditional ad valorem property tax system with a classified system based on use-value assessment. On the other hand, Proposition 4 would create an assessment system requiring land to be appraised at both market value and use value, a system that would be unwieldy and extremely difficult to administer.³⁴

Proposition 4 proponents presented a united front and ran a strong campaign. Paul Lunardi picked up eighteen (bipartisan) coauthors for his bill, and he also helped to direct the voter campaign. In July 1961, he and two other assemblymen formed the “ACA-4” committee. Six months later, after the committee attracted interest from the state’s major farm organizations, it dissolved into “Californians for Proposition 4.” Lunardi was elected chairperson of the steering committee, which included Gordon Van Vleck, president of the Cattlemen’s Association; Louis A. Tozzoni, CFBF president; Blain [J.B.] Quinn, master of the California State Grange; and Keith Mets, president of the Council of California Growers. Californians for Proposition 4 spent almost \$120,000 on its campaign. The Cattlemen’s Association contributed more than \$17,000 of this total; the CFBF contributed nearly \$11,000; and identifiable donors of \$1,000 or more included the Irvine Company, Imperial Valley Farmers Association, Inc., Sunkist Growers, an ad-hoc organization called the Agricultural Council of California, Bailey Farms Company, Diamond Walnut Growers, Inc., and Fruit Growers’ Supply Company.³⁵ Farm interest groups and corporate agriculture clearly had decided to support preferential taxation.

³³ As reported in *CFB Monthly* (November 1962): 5.

³⁴ See typescript of address entitled, “Preferential Taxation of Farm Property,” delivered at a symposium on Proposition 4 sponsored by the University of California, Los Angeles, Graduate School of Business, June 8, 1962, Papers of Ronald Welch, California State Board of Equalization, Sacramento.

³⁵ Davies, 26–27.

Despite proponents' well-organized and reasonably well-financed campaign, the referendum failed, but only by a slim margin: 2,384,064 to 2,147,761.³⁶ During the post-mortem, several reasons were advanced to explain its defeat: voter belief that farmers would receive an unwarranted subsidy, that larger landholders would realize greater benefits, and that the measure would encourage speculators to go even farther into the hinterland in search of inexpensive, developable land.³⁷ Californians for Proposition 4 also attributed defeat to an underfinanced campaign. Though they failed to marshal a majority of votes in 1962, the vote was close enough to mobilize the losers for a second attempt.

PLANNERS RETREAT

The 1957 legislative session marked the first and last time that agricultural zoning and preferential tax advocates joined forces. With passage of the 1959 Open Space Act, "open space" became a catchword among planners seeking a politically feasible agricultural land preservation strategy. In a March 1960 speech before the State Board of Agriculture, Karl Belser congratulated Farr on having authored the most farsighted proposal that he had seen laid before the Legislature. Belser noted that although the Open Space Act did "not seem to have the broad application to agricultural land," it did "open the door" for land conservation policies that applied to "functional open space," by which he meant agricultural land, watersheds, and flood plains.³⁸

In June 1960, Elton R. Andrews, planning officer for the State Office of Planning, also spoke before the Board of Agriculture and presented it with a similarly reasoned argument for state agricultural land-use planning. He pointed out that the Legislature had directed the SOP to produce a general plan that included recommendations for conserving lands valuable to the

³⁶ California Secretary of State, *Statement of the Vote*, General Election, November 6, 1962, 29. A majority of voters in 38 counties voted for Proposition 4; these counties included eight of the 11 counties in the Sixth Assembly District and 17 of the 20 counties where assessment practices could be deemed questionable.

³⁷ As summarized in Mize, 15–17.

³⁸ "The Encroachment of Urban Development into Agricultural Areas," TS copy of address delivered to member of the California State Board of Agriculture, Sacramento, March 21, 1960 (Records of the Board of Agriculture, 1960).

state for their actual or potential agricultural, forestry, mining, recreation, fish, and wildlife uses. Andrews therefore asked the board to consider agricultural land conservation as a “segment of the larger land use problem of conserving land for a variety of ‘open’ or low-intensity uses,” in hopes of winning the board’s support for the State Development Plan concept. He was optimistic that if the state agencies which had an interest in agriculture and land use could “identify the place of agriculture in the open space pattern,” then the state could find a suitable agricultural land preservation policy. As Andrews freely admitted, his notion of a suitable policy might “be attacked as politically unrealistic,” but his convictions nonetheless led him to assert that “either strict state zoning or some method of acquiring control of development rights,” were the only policy options that would be effective.³⁹

Although Senator Farr introduced legislation in 1961 that would have expanded the Open Space Act to authorize state purchase of property easements, his effort failed.⁴⁰ Moreover, while the SOP was busy trying to find funds to proceed with the state development plan, organized farm groups successfully blocked a state government reorganization attempt that would have facilitated state land-use planning. In February 1961, Governor Edmund (Pat) Brown announced his intent to reorganize the state government bureaucracy under eight agencies, the directors of which would form a cabinet to formulate policy for the executive branch. The “agency plan” was to take effect on October 1, 1961, with William E. Warne, director of the Department of Water Resources and former director of the Department of Agriculture, as the new director of the most controversial proposed agency, the Resources Agency. Under Brown’s reorganization plan, five departments were to be subsumed under the Resources Agency: the departments of Agriculture, Conservation, Water Resources, Fish and Game, and Parks and Recreation.⁴¹

³⁹ “The Place of Agricultural Lands in the Comprehensive Open Space Program,” TS copy of speech delivered to the California Board of Agriculture, Sacramento, June 20, 1960 (Records of the Board of Agricultural, Urban Sprawl Subject File, 1960).

⁴⁰ Davies, 73–74.

⁴¹ “Statement of Governor Edmund G. Brown on Reorganization of State Government,” transmitted to the California Legislature, Monday, February 13, 1964, Papers of Governor Edmund G. Brown, California State Archives; California Resources Agency, *The Story of the Resources Agency of California; Organized for Conservation, Economy, Efficiency* (Sacramento: November 1961), 3–7.

No sooner had Brown's proposal been introduced to the Legislature than the CFBF, the California State Grange, the California Council of Agriculture, the Cattlemen's Association, a score of smaller agricultural interests, and the State Chamber of Commerce showered letters of protest upon the Board of Agriculture. In similarly worded messages, each of these organizations demanded that the board do everything in its power to see that the Department of Agriculture remain an independent state agency. In the Senate, the CFBF used its influence before the Governmental Efficiency Committee, to which the bill was assigned for consideration. During the final hearing, the Senate committee acquiesced and amended the bill to remove the department from the proposed Resources Agency.⁴² In an address delivered before the Governor's Conference on the Agency Plan, held in Sacramento on November 16, 1961, Brown noted that one of the objections to his plan was that it overlooked "legislative intent, particularly with respect to the Department of Agriculture." He assured those assembled that the department would "remain independent" of the Resources Agency.⁴³

Without the Department of Agriculture securely linked to the Resources Agency, it was impossible for the director to develop legislative policies that included agricultural land resources. Moreover, when the State Office of Planning took a wait-and-see attitude toward agricultural

⁴² Letters to the Board of Agriculture from 18 organizations, each of which vehemently protested the governor's proposal. The wording of these letters is similar enough to indicate that the protest was centrally directed, although the responsible organization is, of course, unidentified. Records of the Board of Agriculture, 1961-1962, California State Archives; *CFB Monthly* (August 1961), 19.

⁴³ Mimeographed copy of the governor's address in Records of the Department of Conservation: Administration, General Correspondence, 1961, California State Archives. There is reason to believe that Governor Brown was trying to achieve centralized state resource planning via this reorganization effort. William Warne, the person chosen to head the Resources Agency, was concerned enough about urban fringe agricultural land problems to compile a file of pertinent materials while he was director of the Department of Agriculture. The file includes scattered correspondence indicating that Warne had spoken with others about the need to preserve "open areas near metropolitan concentrations" as well as a copy of *Green Gold*, published by the Santa Clara County Planning Department, and a preliminary report from the State Office of Planning recommending that the state undertake "regulation of land use of the acquisition of development rights" in order to preserve agricultural land resources" (see Records of the Department of Agriculture: Administration, Correspondence of Director William E. Warne, Urban Sprawl, 1960, California State Archives).

land preservation in 1964, planners finally realized that the Legislature would not adopt centralized land-use planning to conserve California's agricultural lands. The full meaning of home rule was now clear. By 1964, the outlook for state land-use planning was bleak, but not, however, politically hopeless. As the decade turned, planners discovered political allies among those who supported a new conservation movement. Their combined strength would indirectly influence passage of John Williamson's land conservation bill in 1965 and the companion tax act of 1966.

THE CALIFORNIA LAND CONSERVATION ACT

In 1963, the Legislature proved it was ready to deal seriously with the preferential tax issue when the Assembly directed its Committee on Agriculture and Committee on Revenue and Taxation to conduct joint interim hearings on agricultural land use in relation to taxation, zoning, and urbanization. This marked the first time that two committees were conjoined to study agricultural land issues. The Assembly Committee on Agriculture had heretofore examined urbanization and farmland property taxation as only two of many problems facing California's agricultural industry. During the 1959 legislative session, the committee held eleven interim session hearings to investigate the problems facing small-farm operators in particular. After conducting lengthy discussions on vertical integration, cooperatives, collective bargaining, labor, chemicals and environmental health, water and power, urban growth, and taxation, the committee devised its so-called "Survival Program for California Agriculture." The eleven-point program was, in essence, a list of recommended legislation, and in last place was "legislation . . . to prevent the loss of our best farmland to sprawling cities and the spreading net of freeways."⁴⁴

John Williamson, who eventually secured passage of the 1965 California Land Conservation Act (CLCA), sat as vice chairman of the Committee on Agriculture, becoming chairman in 1963. It was his first committee assignment upon coming to the Assembly in 1959; and at that time the

⁴⁴ House Resolutions No. 324 and 410, Assembly Concurrent Resolution No. 65, *Final Calendar*, 1963 Regular Session; Assembly, Interim Committee Reports, *Vertical Integration, Family Farm, Agricultural Chemicals Greenbelting, Other*, 17, no. 9 (1959–1961), 7, 9–10.

committee concerned itself with problems specifically plaguing small-farm owners and operators. Williamson, although not a farmer, represented a rural district, Kern County, and he was, in his words, “pressed into being interested in the problem of agricultural land taxation.” He found, however, that “there still was not great concern among people over the plight of the poor farmer.” He and his colleagues tended to see themselves as responding to farmers “in areas where really good land was, which was around the San Francisco Bay in Santa Clara County.”⁴⁵ Since the late nineteenth century, the farming industry in Santa Clara County had been, of course, widely noted for its small-scale, high-yield orchard operations. Even as late as 1959, Santa Clara County farms averaged 158 acres; only four counties in California had lower average-sized farms.⁴⁶ Thus, without ignoring California’s burgeoning large-scale corporate agriculture sector, Williamson, as well as others, perceived small farm operations as the mainstay of the state’s agricultural industry. Indeed, they wanted to keep it that way.

When the Assembly committees on Agriculture and Revenue and Taxation held their first joint interim hearing, members listened to several agriculturalists promote variations on the preferential tax assessment theme. Representatives from the California Farm Bureau Federation, the California State Grange, the Agricultural Council of California, and the California Forest Protective Association (an association of commercial foresters), as well as the managing editor of the *California Farmer* and the director of the State Department of Agriculture appeared to support some form of use-value assessment. Their presentations opened with a standard litany of individual cases where owners of farmland in the path of urban growth were subjected to ever-increasing property tax bills which soon exceeded the farm’s net per-acre income, proof positive that the ad valorem tax system was outmoded. In response to committee questions, farmers acknowledged that they could not expect the Legislature to grant tax relief without also accepting recovery provisions so that government could recoup lost revenue when the land was converted to another use. Farmers also understood that recovery provisions would require assessors to record dual assessments on farm property, market value and use value, which would impose additional

⁴⁵ Author interview with John Williamson, April 28, 1982, Davis, California.

⁴⁶ U.S. Bureau of the Census, *County and City Data Book*, 1959, 50.

administrative costs to be paid from reduced tax revenues. But, they argued, the present ad valorem principle was, in effect, pushing some bona fide farmers off the land. Farmers further admitted that some greedy individuals might misuse preferential or deferred taxation to evade property taxation. But, argued State Grange Master J.B. Quinn, without some form of use-value assessment, California stood to lose a “sound rural economy . . . [characterized] by efficient, independent farm families.”⁴⁷

Although use-value assessment supporters held a clear majority among those testifying at the hearing, John Keith, chief deputy assessor of Los Angeles County, made a forceful, final effort to forestall what seemed almost inevitable. Boldly asserting the creed of all private property rights defenders, that “land and freedom are interlocked and inseparable,” Keith argued that “special privileges and exemption from the ad valorem tax on land tend to destroy the foundations of a free market in land, freedom of economic action, and thus our free society.”⁴⁸ In a curious way, those who argued for preferential taxation and Keith, with his impassioned plea to uphold ad valorem tax principles, were seeking the same goal: to keep agricultural land in the hands of as many owners as possible. The two sides exposed the fundamental dilemma facing legislators: how to fashion a policy to protect smaller, independent farmers from the undesirable consequences of urban growth without undermining private property rights.

While the two committees were conducting their joint study in 1964, the Assembly Committee on Revenue and Taxation simultaneously studied the state’s entire tax system with an eye toward major reforms. The Senate, meantime, launched its own comprehensive study of the state’s tax system to ascertain the need for tax reform. These investigative efforts included special inquiries into assessment patterns and property taxation in relation to land use.⁴⁹

⁴⁷ Assembly, Interim Committee on Agriculture and Interim Committee on Revenue and Taxation, *Proceedings, Joint Meeting, Fresno, January 30, 1964*; statements by Quinn, 58–59, statements by Elmer Melschau, San Luis Obispo County Farm Bureau, 76, 80.

⁴⁸ *Ibid.*, Appendix C, 15.

⁴⁹ See Senate, Fact Finding Committee on Revenue and Taxation report cited above; see also David R. Doerr and Raymond R. Sullivan, “Property Taxation and Land Use” in California, Assembly Interim Committee on Revenue and Taxation, *Taxation of Property in California; A Major Tax Study*, Part 5 (Sacramento, December 1964), 203–228.

In addition, shortly after Williamson was appointed chairman of the Committee on Agriculture in 1963, he put together an “industry advisory committee” with the aid of William Geyer, consultant to the Committee on Agriculture. Those asked to sit on the advisory committee represented several agricultural groups, tax assessors, and agricultural economists. John Kovakovich, a Kern County grower and a friend of Williamson’s, served as the Advisory Committee chairman. Other members included Don Collins, director of the CFBF Research Department; J. Herbert Snyder, professor of agricultural economics at the University of California, Davis; William Staiger, representing the Agricultural Council of California; Elmer W. Braun, an economic advisor with the State Department of Agriculture; Ronald Welch, executive secretary of the State Board of Equalization; “a couple of farmers from over around Calistoga”; an assessor; and a member of the County Supervisors’ Association.⁵⁰ The advisory committee represented, to a large degree, people who supported preferential taxation. Collins, Snyder, and Staiger had previously spoken in support of preferential taxation before legislative committee hearings. Ronald Welch was the only identifiable opponent of preferential taxation.

Williamson recalled that he and Geyer were initially “somewhat impressed with the idea of the acquisition of conservation easements,” although no outspoken advocate for conservation easements sat on the committee. The record substantiates Williamson’s claim. Early drafts of the bill that ultimately became the Land Conservation Act embodied transfer of development rights concepts. These proposals, primarily authored by Geyer, would have allowed farmers to transfer to counties the development rights on their land in return for just compensation from the county. Only prime agricultural lands (Class I and II soils as rated by the Soil Conservation Service) in an agricultural preserve were to be eligible, although prime “livestock acreage” was to be excluded “in an effort to avoid problems presented by ‘gentlemen farmer’ types of operations.” There was

⁵⁰ Williamson interview; memorandum marked February 1965 from Clyde Blackmon to Jim Pardue, consultant to the Committee on Natural Resources and Conservation (Assembly Interim Committee on Natural Resources and Conservation, Working Papers, 1962–1964, California State Archives); see also Governor’s Chaptered Bill File, Chapter 1443 (1965), letter dated July 9, 1965, from John Williamson to Governor Edmund G. Brown.

hope among conservationists, at this point, that if Geyer's program proved to be workable for agricultural lands "it may have other applications in areas such as the conservation of open space, preventing reclamation of tidelands, etc."⁵¹

Williamson's advisory committee also considered agricultural zoning and concluded that "the laws the Legislature had adopted were pretty much useless because zoning just wasn't that permanent a restriction upon the use of the land." Agricultural preserves, i.e., aggregate minimum acreages of prime land, were seen as a means to circumvent the inherent weaknesses of zoning laws. Geyer also gathered information for the committee on the land conservation laws adopted by other states: Maryland (1956, 1957, 1960), Florida (1959), New Jersey (1960, 1963), Hawaii (1961), Oregon (1961), Connecticut (1963), and Indiana (1963).⁵²

The bill that eventually emerged from the advisory committee was a hybrid of the development rights purchase approach and the preferential taxation approach. Instead of outright development rights purchase, which the committee rejected as prohibitively expensive, or unadulterated preferential tax assessment, which was bound to fail the test of constitutionality, the committee struck upon the idea of offering tax subsidies to farmers who would sign restrictive land-use contracts.⁵³ After this idea was agreed upon in principle, "the job then was to write the law in such a way that it would not be so burdensome that no landowner would put his land under the contract, but would still be meaningful enough that there would be a conservation aspect to it." To achieve this balance the committee decided that a ten-year, annually self-renewing contract would set a time limit neither too fleeting for most conservationists nor too permanent for most landowners.⁵⁴

⁵¹ Williamson interview; memorandum dated December 1, 1964, from William Geyer, to members of the Advisory Committee, Assembly Interim Committee on Natural Resources and Conservation, Working Papers, 1962-1964.

⁵² William H. Geyer and Peter Hanauer, "Preserving Agricultural Lands in Areas of Urban Growth: A Look at the Record," unpublished report prepared for the Assembly Interim Committee on Agriculture and the Advisory Committee on Agricultural Land Problems, May 20, 1964 (revised February 1, 1965). N.B.: where more than one date appears after a state, it indicates that additional legislation amended constitutional provisions requiring ad valorem property tax assessment.

⁵³ Williamson interview.

⁵⁴ *Ibid.*

These concepts defined the bill that John Williamson introduced as AB 2117 during the 1965 legislative session. Although the advisory committee redrafted the proposal several times before Williamson introduced it in the Assembly, the bill suffered many more amendments before it passed through both houses. The Cattlemen's Association succeeded in obtaining "the most basic and substantial amendment" in Williamson's view: It had been his and the committee's intent to ensure that only prime agricultural land would be eligible for the restrictive contract-tax subsidy arrangement. But Williamson had to settle for extending this provision "to include all agricultural land as it might be defined by the county board of supervisors" in order to secure support from this powerful group.⁵⁵ The amendment, in effect, eroded state control over the proposed program by allowing county governments, still catering to rural interests, to determine which agricultural landowners could participate.

Conservationists, according to Williamson, "were interested and supportive" of AB 2117, but "their objectives went so far beyond it that it just didn't seem to be all that important" to them. In contrast, there "was always opposition from farmers and landowners who thought they shouldn't have to make any kind of concession at all in order to get [lower tax] assessments." In any event, these two groups were seen as the extremists, "just philosophers, really." Williamson and the advisory committee were interested in crafting a bill that "would see the light of day, legislatively,"⁵⁶

The formidable opponent was the League of California Cities, which "never did like the bill." On the last day of the session, Williamson personally shepherded the bill from the Senate Committee on Finance to the Senate floor for a vote, then on to the Assembly for a concurrence vote on the Senate amendments. As Williamson tells the story, he was about to enter the Finance Committee hearing when league Executive Director Richard Carpenter informed him in person that it would withdraw support

⁵⁵ Ibid.

⁵⁶ Ibid. In an interview of January 13, 1982, Tom Willoughby, senior consultant to the Assembly Energy and Natural Resources Committee, also noted that the Sierra Club, the state's primary environmental political interest group in the early 1960s, was not concerned with agricultural land conservation. The Williamson Act, according to Willoughby, was designed to respond to the "myth" of the committed farmer on the urban fringe, a perception set before the Legislature, especially by the California Farm Bureau and the Cattlemen's Association.

unless Williamson amended the bill once more to exclude from contract eligibility all land within three miles of city boundaries. Angry that the league would attempt a last-minute sabotage, yet realizing their support was critical, Williamson reluctantly agreed to introduce legislation for that purpose during the next session. As luck would have it, he was defeated during the next election and thereby released from this onerous task once the CLCA became law.⁵⁷

Williamson also introduced a companion bill, AB 3128, sponsored by the CFBF. This measure to amend the revenue and tax code required assessors to assume that land zoned for exclusive agricultural use and under contract, as provided by the CLCA, would remain in agricultural use indefinitely. It also passed both houses and received the governor's signature, even though the Office of Legislative Counsel doubted the bill's constitutionality.⁵⁸ Since AB 3128 was not a constitutional amendment, it had to be tested in the courts. Preliminary events were not encouraging. The owners of Greenbelt Ranch in Marin County signed the first Williamson Act contract, but the county assessor decided to base the new assessment on the assumption that the owners would give a notice of nonrenewal the following year.⁵⁹ Constitutional provisions governing property taxation still presented a stumbling block.

THE TRIUMPH OF PREFERENTIAL TAXATION

In 1966 two measures were enacted that firmly anchored preferential taxation to the CLCA. Assemblyman Nicholas Petris introduced AB 80, later known as the Property Tax Assessment Reform Law, during the 1966 First Extraordinary Session. The measure was drafted in reaction to disclosures of bribery in 1965, after which several assessors, assessors' assistants, and taxpayers were indicted on criminal charges. The law revised state codes governing property tax assessment procedures and standards. It also upheld the 1965 companion act to the CLCA by

⁵⁷ Williamson interview; *California Statutes*, 1955, Chapter 1443.

⁵⁸ Governor's Chaptered Bill File, Chapter 2012 (1965); *California Statutes*, 1965, Chapter 2012; *CFB Monthly* (August 1965): 12.

⁵⁹ Williamson interview.

directing assessors “to recognize the effect of enforceable restrictions on the use of land” when valuing land for property taxation.⁶⁰

The second measure was the heretofore elusive amendment that extended classified taxation to agricultural land. Senator Farr, author of the 1959 Open Space Act, coauthored the measure with Assemblyman John Knox (Contra Costa). Not coincidentally, Knox represented a district where a grassroots conservation effort to “save San Francisco Bay” from industrial, commercial, and residential overdevelopment had gained considerable momentum.⁶¹

Farr introduced SCA 4, the Open Space Conservation Amendment, during the 1966 First Extraordinary Session. The measure would allow the Legislature to “define open space lands and provide that when such lands are subject to enforceable restrictions, as specified by the Legislature . . . [they] shall be valued for assessment purposes on such basis as the Legislature shall determine to be consistent with such restriction and use.” Although agricultural land was not mentioned specifically in the bill, legislators tacitly understood this to be the bill’s chief target. Such was not the case when Farr introduced the bill, however. Only after SCA 4 encountered committee opposition in the Assembly, did Farr seek Williamson’s help to keep it alive. Williamson’s committee consultant, William Geyer, and CFBF’s legislative advocate, Don Collins, helped Farr rewrite the bill which

⁶⁰ *California Statutes*, 1966, Chapter 147; Arena, *History*, 75–76. Assessor scandals precipitated legislative action, but assessment treatment continued to vary from group to group despite 1950s’ equalization efforts. The latter circumstance also prompted Petris to call for tax study and reform, according to Joseph A. Janelli, director of Governmental Affairs for the CFBF, in an interview of January 21, 1982.

⁶¹ See Rice Odell, *The Saving of San Francisco Bay: A Report on Citizen Action and Regional Planning* (Washington, D.C.: The Conservation Foundation, 1972). Catherine Kerr, wife of Clark Kerr, then president of the University of California, was the primary instigator. She and two other “faculty wives” began their efforts in 1960. By 1963, they had enlisted the active support of Assemblyman Nicholas Petris (Oakland); and by 1964, State Senator Eugene McAteer (San Francisco) had joined the force. Petris and McAteer cosponsored the 1965 legislation which established the San Francisco Bay Conservation and Development Commission. The Sierra Club was a major supporter of the effort, which marked the first time the club had ever given attention to an urban environmental cause. The movement also had overwhelming popular support. At its peak in 1965, the Save San Francisco Bay Association had 18,000 members.

finally passed both houses.⁶² An uneasy conservationist–agriculturalist alliance echoed the tenuous farmer–planner coalition of 1957.

Once passed by the Legislature, SCA 4 appeared as Proposition 3 on the November 1966 ballot. Farm Bureau members were urged to support the measure to make the Williamson Act a “two-way bargain” between “the farmer” and “the public.”⁶³ Just who were “the farmers” and “the public?” The list of Proposition 3 supporters speaks for itself. In addition to the CFBF, support came from the Kern County Land Company, the Irvine Company, Tejon Ranch, Buena Vista Farms, the California Canners and Growers, Southern Pacific, the Santa Fe Railway Company, Crown–Zellerbach, the Sierra Club, the State Soil Conservation Commission, the Conservation Law Society of America, the California Labor Federation/AFL–CIO, the League of California Cities, and the California State Chamber of Commerce.⁶⁴ This unlikely assortment suggests that some supporters either misunderstood the bill’s intent or were willing to grant concessions in hopes of future political gains. In any event, urban voters decided the outcome. Whereas Proposition 4, almost identical in intent, had failed in 1962, Proposition 3, worded in less direct language and promoted as open space conservation, garnered sufficient urban support to pass by a margin of about 600,000. Critical support came from the counties of San Francisco, Contra Costa, Alameda, and Marin, where “yes” votes for Proposition 3 were considerably higher than the “yes” votes recorded in these counties for Proposition 4.⁶⁵

Under the authority granted to it by Proposition 3, the Legislature immediately bestowed special assessment upon agricultural lands under Williamson contracts. Soon thereafter, other interest groups, from the outdoor advertising industry to the rock, sand, and gravel industry, began to press for preferential property tax treatment. The Legislature quickly responded by establishing a special joint committee to determine which land uses qualified as “open space” under Proposition 3.⁶⁶ The California Land Conservation Act, the Property Tax Assessment Reform Act, and the Open

⁶² Davies, 32, 94; *California Statutes*, 1966, Chapter 104.

⁶³ *CFB Monthly* (November 1966): 8.

⁶⁴ Davies, 33.

⁶⁵ *Ibid.*, 96–97.

⁶⁶ *Ibid.*, 98–100.

Space Conservation Amendment thus gave the Legislature the legal tools to create a more extensive system of classified property taxation. It was, however, a system in which the state bowed to the tradition of local autonomy over land-use decision making and vested implementing control with county governments.

THE POLITICS OF CONSERVATION

The drive for preferential taxation that began in remote rural counties thus became California's land conservation strategy with the help of urban-based conservationists recently drawn to the cause of preserving "open space." Under the stipulations of the Conservation Amendment, "open space" meant whatever interest groups pressed legislators into defining as open space. But the California Farm Bureau Federation no longer spoke for the most powerful agricultural interests. During the late 1950s, the CFBF successfully promoted preferential assessment before the Legislature as the answer to a host of farm problems only to be overshadowed by an array of powerful corporate interests and newborn conservationists in the 1960s. Major legislative concessions had been made to the Cattlemen's Association, which promoted the interests of large landowners almost exclusively, in order to pass the CLCA. It was a crucial concession. One needs only to peruse the statistics compiled in 1971 by the Center for Study of Responsive Law to see why the Cattlemen's Association insisted that non-prime land be included in the Williamson Act in return for their support. As of 1970, 5,391,564 acres of land were covered by Williamson Act contracts; 3,821,494 acres, over 70 percent of the total, were classified as non-prime. The list of major tax beneficiaries then included Southern Pacific, Tejon Land Company, Kern County Land Company, Buena Vista Farms, three lumber companies, two oil companies, and a host of large landowners which included the Van Vleck family. As for solving the problems of smaller farm owners, between 1964 and 1969 the average farm size in California jumped from 458 acres to 627 acres.⁶⁷

Conservationists, considered by most legislators to be an extremist, and therefore a politically unimportant group, suddenly gained strength

⁶⁷ Robert C. Fellmuth, *The Politics of Land* (New York: Grossman Publishers, 1973), Appendix 2A [571–584, which are unnumbered in this section].

in the mid-1960s as the result of a single issue that had great voter appeal in a major metropolitan area: saving the San Francisco Bay from industrial polluters and corporate developers. Legislators representing agricultural interests were quick to capitalize on the conservationists' popular cause. Poorly organized conservationist groups, for their part, had few bargaining chips. Thus, to advance legislation that would sustain an energetic constituency, conservation leaders were willing to negotiate with agricultural interests. Legislators, of course, knew the full import of Proposition 3, but it is doubtful that Bay Area voters who helped to pass the measure looked beyond the shores of their treasured bay.

What happened to agricultural zoning? Contrary to what one might expect, legislative proposals for exclusive agricultural zoning continued to appear. But by 1965, agricultural zoning had proved to be no threat to urban development and expansion; the bold planning attempts in Santa Clara County had been ineffectual. By the mid-1960s, Karl Belser had become one of the most outspoken advocates for conservation easements and development rights acquisition as the only truly effective means of preserving agricultural land.⁶⁸ It is a sad commentary on the political process that by then, Belser, who helped to launch the agricultural land preservation movement, was pigeonholed as an extremist. While John Williamson and William Geyer sought initially to base agricultural land preservation legislation on conservation easements, they also failed to include its chief spokesman on the advisory committee.

In 1965, State Senator Robert Lagomarsino introduced the bill that finally extended exclusive agricultural zoning to all counties. Whereas Williamson had parried with the League of California Cities to exclude an amendment that would prohibit contracts on land located within three miles of municipal boundaries, Lagomarsino made no move to prevent an

⁶⁸ Speaking before Williamson's Committee on Agriculture in mid-1964, Belser minced no words when he pointed out that the "ten years of study" devoted to agricultural land preservation had produced "very little" to "indicate any serious desire to activate a program oriented toward protecting for oncoming generations the limited amounts of truly valuable, high producing agricultural land in California." He urged the committee to take "strong action" and propose legislation for conservation easements or development rights acquisition. Assembly, Interim Committee on Agriculture, unpublished proceedings of seminar held on July 2, 1964, at San Jose, located in the California State Library.

identical three-mile exclusion amendment from being attached to his zoning bill.⁶⁹ The League finally succeeded in nullifying agricultural zoning near urban areas.

Consensus politics brought California into the forefront of those states enacting measures to preserve agricultural land and open space; observers hailed the restrictive covenant as a major advance. For some years, the CLCA was popularly perceived as sound environmental legislation, despite disclosures revealing the major tax beneficiaries to be large landowners and corporations whose chief interests were nonagricultural. Apologists freely acknowledged the act's shortcomings, but were quick to point out that its tax provisions enabled hundreds of small farmers to stay in business a little longer. So they did, but the degree to which the CLCA slowed urban growth is debatable. Moreover, the provisions of the act that defined qualifying agricultural land unquestionably helped large landowners, with property far removed from the possibility of urban development, to benefit.

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⁶⁹ Davies, 21–22; *California Statutes*, 1965, Chapter 1443.

Chapter 8

THE MUTABILITY OF FEDERALISM: RESHAPING THE CONTOURS OF THE WILLIAMSON ACT

The California experience suggests that we have, at best, an imperfect understanding of American federalism, both in theory and practice, when it comes to understanding the power that resides in local governments. State and local interaction in land-use matters presents an intriguing arena in which to explore the dynamics of federalism. In part, this is because the federal government has remarkably little control over private land use, and, in part, because California's history as a state is fraught with land controversies. In this respect, the history of politics and policies in relation to agricultural land development and conservation in California helps to illuminate the shadowy third corner in the triad of federalism.

Land reform was a major political issue in California during the nineteenth century. Henry George observed how swiftly a corrupt land administration system allowed public lands to pass easily into the hands of a relatively small number of people. These conditions impelled him to advocate for using the tax system as a vehicle to implement a redistributive land policy, one that would serve the general welfare rather than private, and sometimes monopolistic, interests. George's ideas influenced those who framed the 1879 Constitution, which gave the state the necessary power to adopt a classified system of property taxation. An 1896 amendment to the

Constitution granted cities the right to form charter governments which, once approved by the state Legislature, gave cities greater power over vaguely defined municipal affairs. Thus, when progressive ideas began to reshape thinking about governmental responsibilities, the California Constitution provided some hint of the pattern these ideas would embroider on the governmental system.

In 1911, California extended home rule to county governments. Since the turn of the twentieth century, the courts have determined many of the functions that constitute a rightful exercise of local power under home rule. The voters and the Legislature, however, determined that two specific powers should be reserved for all local governments. One was the power to levy and administer local property taxes to finance governmental operations directly, with minimal interference from the state. The other was the right to adopt planning policies and procedures to govern local land use. These two actions broadened the scope of home rule.

The 1911 home rule amendment, coupled with the 1910 tax amendment gave tax reform advocates the incentive to propose a series of single tax measures tied, in part, to long-standing agitation for breaking up the remaining large landholdings in the state. They were unsuccessful, but the Progressive-Era political climate spawned two state initiatives that further demonstrate a radical level of dissatisfaction with California's land policies. The Commission on Immigration and Housing, under Simon Lubin's direction, urged the state to adopt a graduated land-value tax to break up large landholdings, the first serious proposal for the state to use the property tax system to stimulate economic development that would promote the general welfare. Through the Land Settlement Board, under the direction of Elwood Mead, the state experimented with the idea of framing a land policy based on planning for agricultural development and land conservation. The goal was to promote prosperity in the small farm sector of the agricultural industry in the belief that small farm owners-operators were better stewards of the land and, hence, better citizens.

In the end, neither of these two flirtations led to a state land policy. By the early 1920s, voters had rejected the idea of using the property tax system to effect land reform, and state political leaders tended to be more conservative in thought. Although serious problems continued to plague the entire tax system, the state paid little attention to local property tax

reform until the late 1940s. The 1929 Planning Act, moreover, officially delegated land-use planning powers to local governments. Thus, by 1930, local governments in California held important powers with respect to land policies, and post-1930 legislation cemented local autonomy over land-use matters. This legislation also encouraged provincialism and territoriality among local governments. The 1937 Planning Act amendments gave county governments authority over rural land use. But the 1939 Uninhabited Territories Act gave cities the authority to ignore any land-use planning counties might have attempted under the 1937 act. Moreover, when the federal government endeavored to stimulate state and regional planning as an extension of proposed national planning, California complied in form but not in substance. Then, during the 1940s, the state transformed so-called state planning into a program designed to promote industrial development through private enterprise. California thus precluded the federal government from taking any substantive role in land-use planning during the 1930s and 1940s.

Post-World War II population and related urban growth brought matters to a head. When local government autonomy developed into urban-versus-rural fighting over annexation issues, cities and counties turned to the state looking for resolution. Despite hope in some quarters that the State Office of Planning might take on functions worthy of its name, the Legislature, after ten years of debate, settled instead on an agricultural land conservation solution entirely in accord with the state's strong tradition of home rule.

GRAPPLING WITH THE CONCEPT OF AMERICAN FEDERALISM

Until the turn of the twentieth century, the concept of dual federalism satisfactorily described the basic architecture of government in the United States, i.e., through the U.S. Constitution, The People vested different powers in two separate centers, the national government and the states, with each level of government duty-bound to maintain the limits of authority granted unto it. States had the authority to delegate powers to local governments. That skeletal concept has long been considered wholly inadequate to describe the reality of federalism. Scholars as well as political leaders

have advanced more complex concepts of American federalism to account for observed or intended changes in its practical operation.¹

The 1960s was a particularly rich period of discussion and debate, in large part because the role of the federal government in domestic affairs expanded dramatically during the Kennedy and Johnson presidential administrations. Morton Grodzins offered a rather benign theory of *cooperative federalism*, metaphorically described as a “marble cake” in which the three planes of government share functions in a disorderly fashion. In this concept, the process, even though its complexity gives the appearance of chaos, actually renders the system more stable and keeps governments at all levels more responsive to the people. Grant-in-aid programs and the ever-increasing number of career professionals, i.e., functional bureaucrats, who administer them, were cited as the major forces stimulating greater intergovernmental collaboration. Grodzins also asserted that collaboration has been the normal state of intergovernmental relations since the nation’s founding, and posited a steady, centralizing tendency in federalism.² The centralizing trend, i.e., power intermittently tightening at the top, was generally accepted, although other aspects of cooperative federalism were challenged or rejected.³

Nelson Rockefeller introduced the idea of “creative federalism,” which became synonymous with President Lyndon Johnson’s Great Society

¹ See, for instance, Richard H. Leach, *American Federalism* (New York: W.W. Norton & Co., 1970), 10–14; W. Brooke Graves, *American Intergovernmental Relations* (New York: Charles Scribner’s Sons, 1964), 112–126, 932–953; Daniel J. Elazar, *The American Partnership* (Chicago: University of Chicago Press, 1962), 11–21.

² Morton Grodzins, *The American System*, ed. Daniel J. Elazar (Chicago: Rand McNally and Company, 1966), especially 60–88. Daniel Elazar acknowledged more conflict on the playing field and modified the notion of a steady, centralizing momentum; see Elazar, “Federal–State Collaboration in the Nineteenth-Century United States” in Elazar, ed., *Cooperation and Conflict* (Itasca, IL: F.E. Peacock Publishers, 1969), 83–108, and Elazar, “The Shaping of Intergovernmental Relations in the Twentieth Century,” in Elazar, ed., *Cooperation and Conflict*, 135–142.

³ Harry Scheiber, for instance, pointed out that Grodzins failed to “consider the basic issue of power as it was distributed relatively among levels of government.” See Harry N. Scheiber, “The Condition of American Federalism: An Historian’s View,” A Study Submitted by the Subcommittee on Intergovernmental Relations to the Committee on Government Operations, United States Senate, October 15, 1966, published in Frank Smallwood, ed., *The New Federalism* (Hanover, N.H.: Public Affairs Center, Dartmouth College, 1967), 19–55.

initiatives.⁴ Impatient with states that seemed unwilling to or incapable of responding adequately to problems of civil rights, poverty, and urban decay, Johnson's solution was to channel categorical grants-in-aid through the states to cities and community organizations to alleviate what were considered foremost to be urban problems. Increased federal spending in the 1960s to solve what largely were considered local problems reflected a notion that all socio-economic problems are national concerns. Local administration of federal categorical grants generally strengthened city governments as well as quasi-governmental civic agencies created to administer federally funded programs.⁵ As Harry Scheiber has observed, creative federalism was a deliberate strategy to strengthen the tripartite architecture of federalism by making cities a more active third partner, although the more enduring characteristic was continued centralization of governmental power.⁶

The Johnson Administration's categorical grants programs increased the number of functional bureaucrats at all levels government, lending credence to what Terry Sanford characterized as "picket fence federalism."⁷ His metaphor aptly conveys the nature of competition between program professionals, who often display little or no allegiance to any level of government, and elected government officials, whose public responsibilities are tied to local or state governmental powers and functions. Thus, although the "pickets" of grant programs are officially attached to the three "rails" of government, they have often been administered in ignorance, isolation, or defiance of local and state politics. The tremendous increase in the number of federal grant programs since World War II prompted the suggestion that all those administrative officials who make

⁴ Nelson A. Rockefeller, *The Future of Federalism* (Cambridge: Harvard University Press, 1962).

⁵ Roscoe Martin, *The Cities and the Federal System* (New York: Atherton Press, 1965), 72–75, 109–115, 171–175.

⁶ Harry N. Scheiber, "Redesigning the Architecture of Federalism — An American Tradition: Modern Devolution Policies in Perspective," *Yale Law and Policy Review/Yale Journal of Regulation* [Symposium Issue] 13 (1996): 269–275.

⁷ Terry Sanford, *Storm Over the States* (New York: McGraw–Hill Book Co., 1967), 80; see also Deil S. Wright, "Revenue Sharing and Structural Features of American Federalism," *Annals AAPSS* 419 (May 1975): 109–111.

the day-to-day decisions represent a fourth partner in the American governmental system.⁸

After taking office in 1969, Richard Nixon proposed that Washington replace the “welfare state” with “a new partnership . . . in which we entrust the states and localities with a larger share of the Nation’s responsibilities.”⁹ Under the slogan of New Federalism, the Nixon Administration sought to centralize income security and natural resources programs, and, through general revenue sharing and “block” grants, decentralize human resources services (manpower training, education, law enforcement) and community development programs. Fiscal measures proved initially to be a powerful tool for accomplishing decentralization goals inasmuch as the block grant distribution process favored traditional governmental units. Thus, federal revenues flowed to states, counties, and municipalities, strengthening both state and local governments.¹⁰

States and local units, however, exercised more discretion over how block grants and shared revenues were spent than many Congressional leaders ever intended. When powerful interest groups began to complain of discrimination in the way funds were distributed, the federal government responded by imposing restrictive rules on spending. Community development, manpower training (CETA), mass transit, and general revenue sharing programs were subject to the greatest increases in federal control, leading Donald Kettl to conclude that “if there had been any doubt about whether the federal, state, or local government was the major partner in the union, the new [Nixon Administration] programs stifled it.”¹¹

Since the 1930s, presidents have demonstrated a growing political awareness of how the federal system can be manipulated, chiefly through fiscal means, to achieve economic or social goals that are considered to be

⁸ Samuel P. Hays, “Political Choice in Regulatory Administration” in Thomas K. McCraw, ed., *Regulation in Perspective* (Cambridge: Harvard University Press, 1981), 124–154.

⁹ Richard M. Nixon, “State of the Union Address,” January 21, 1971, *Congressional Record*, v. 117, 165–169.

¹⁰ Richard P. Nathan, “The New Federalism Versus the Emerging New Structuralism,” *Publius* 5, no. 3 (Summer 1975): 111–125; Wright, 111–119.

¹¹ Donald F. Kettl, *The Regulation of American Federalism* (Baton Rouge: Louisiana State University, 1983), 33–41.

for the good of the nation.¹² The terms “creative,” “picket fence,” and “new” not only describe models that challenge the relatively benign concept of cooperative federalism but also expose the degree of chaos and conflict the federal system can accommodate.

Successive presidents have sought to gain greater control over intergovernmental relations, or, alternatively, check the centralizing trend. President Eisenhower determined to decentralize the federal system during the 1950s, and three different bodies worked toward that end: the second Hoover Commission on Executive Organization, the Kestenbaum Commission on Intergovernmental Relations, and the Joint Federal–State Action Commission. None was successful. During the 1960s and 1970s several more bodies emerged to cope with the increasing complexity of intergovernmental ties. Congress established a permanent Advisory Commission on Intergovernmental Relations in 1959. Voluntary state- and regional-level Councils of Government (COGs), which began forming during the 1950s, increased rapidly in number during the 1960s. The Nixon Administration experimented with several new agencies and organizations, beginning with the short-lived Office of Intergovernmental Relations, established in the Executive Office in 1969; followed by the White House Domestic Council, established in 1970; and ten Federal Regional Councils. An informal New Coalition of governors, state legislators, county officials, and mayors began to take shape in 1973. Offices of intergovernmental relations appeared in most federal agencies during the 1970s. In 1981, President Reagan established two more advisory boards independent of the Advisory Commission on Intergovernmental Relations: a cabinet-level Task Force, under Vice President George Bush, and a forty-member Presidential Federalism Advisory Commission, under the direction of Senator Paul Laxalt of Nevada.¹³

¹² Deil S. Wright argues that fiscal federalism spawned yet another phase of modern intergovernmental relations. He calls this the “calculative” phase, a term with multiple inferences. See “Intergovernmental Relations in the 1980s: A New Phase of IGR” in Richard H. Leach, ed., *Intergovernmental Relations in the 1980s*, Annals of Public Administration, no. 4 (New York: Marcel Dekker, Inc., 1983), 21–30.

¹³ Grodzins, 307–316; “The Intergovernmental and Territorial Dimension of National Policy: Discussion Paper,” Intergovernmental Task Force Advisory Committee on National Growth Policy Processes, August 23, 1976, 16–27; Charles W. Harris, “COGs, A Regional Response to Metro–Urban Problems,” *Growth and Change* 6 (July 1975): 9–15; George S. Blair, “Changing Federal–Local Relations” in Leach (1983), 41.

By the late 1970s at least a few observers wondered whether the system manipulations perpetrated by the Johnson and Nixon administrations had “intergovernmentalized” American federalism to the point of impending malfunction. David Walker, for instance, noted that “an eagerness to legislate high moral principles, on the one hand, and an abiding capacity to tolerate a wide gap between these principles and actual practice, on the other,” had produced enormous “tension between the centralizing and noncentralizing forces inherent in the system.” In his estimation, the system had been “marbleized” to the extent that “clear lines of accountability” were “nearly obliterated.”¹⁴ Scheiber counters that there was a marked dualism to Nixon’s New Federalism. In some respects, the legislative record either left the New Deal–Great Society legacy largely intact or, as in environmental policy, extended the arc of centralization. But Nixon’s New Federalism also set the stage for another round of New Federalism under President Reagan, which focused on deregulation, reducing the volume of administrative rules governing federal programs, and reorganizing the federal bureaucracy. Reaganism also spawned the neoconservative movement that increasingly came to influence the Republican agenda.¹⁵

Scholars of federalism, however it is conceptualized, have amply demonstrated its mutability in response to political, ideological, and judicial forces that pertain to intergovernmental relations at the national and state levels. From this perspective, local governments tend to be characterized more or less as pawns on the chessboard of federal and state players. For the most part, the power of local governments in intergovernmental relations is widely ignored.

THE STATE–LOCAL DIMENSION IN CALIFORNIA

Most students of American federalism agree that “in the early 1930s, the depression all but submerged the states.”¹⁶ There is less agreement on the

¹⁴ David B. Walker, “A New Intergovernmental System in 1977,” *Publius* 8 (Winter 1978): 112–115.

¹⁵ Scheiber, “Redesigning the Architecture of Federalism,” 290–296.

¹⁶ Sanford, 20. James Patterson is a notable exception. His study of federal activity in the areas of work relief, social welfare, labor, and regional planning, shows the degree

degree to which states have recouped power stripped from them during the New Deal and World War II years. Common wisdom nonetheless links state weaknesses and failures with the centralizing trend evident in the federal system during the twentieth century. The litany of weaknesses is lengthy. Excessively detailed constitutions reflected outdated, conservative, even agrarian values, and hampered states from taking decisive action to address urban problems. State legislatures were characterized by malapportioned representation until *Baker v. Carr* (1962), which tended to reinforce a provincial mindset among state officials. Until about 1940, state administrative systems generally were organized inefficiently. And throughout the twentieth century, states were reluctant to expand revenue sources to the degree necessary to carry out substantive new programs or services.¹⁷

As a result, according to this view, states generally were incapable, by design or default, of responding to the needs of American society as it shifted from predominantly rural to predominantly urban. Between roughly 1900 and 1930, states failed to exercise their proper responsibilities in the federal system, thus setting the stage for the forfeiture of power that followed. The Great Depression merely gave the federal government the opportunity to accomplish the inevitable. If states could not or would not respond to urban and metropolitan problems, then the federal government should. Few scholars point out the historic role that states played as policy experimenters in the first half of the twentieth century.¹⁸

Johnson's Great Society and Nixon's New Federalism sought to strengthen the federal system, although in different ways, and the states may have benefited appreciably. Harry Scheiber points to the 1970s as a decade of

to which states forced the Roosevelt Administration to modify policies as they were implemented. Rather than usurp power during the 1930s, he argues, the federal government roused many states from their torpor, and, as a result, states generally maintained a high degree of autonomy throughout the 1930s; see James T. Patterson, *The New Deal and the States* (Princeton: Princeton University Press, 1969), especially 24–25, 207.

¹⁷ Sanford, 17–38; Martin 47–82. By 1980, state administrations were more efficiently organized, state legislatures more representative of populations, and state budgets based on sounder fiscal arrangements; see Advisory Commission on Intergovernmental Relations (ACIR), *State and Local Roles in the Federal System* (Washington, D.C.: U.S. Government Printing Office, 1982), Chapter 3, and David B. Walker, "A Perspective on Intergovernmental Relations" in Leach (1983), 7–9; *Baker*, 369 U.S. 186.

¹⁸ In addition to Patterson, see Sanford at 53–67.

“renaissance” for the states. He argues that tax reform and economic growth gave states the means to modernize governmental structures, and that administering new federal-aid initiatives of the Johnson and Nixon administrations also served to reinforce a trend that was already underway.¹⁹

This certainly was true of California, which experienced phenomenal population and economic growth in the post-World War II era. The modernization of California’s state government began with Governor Edmund (Pat) Brown (1959–1967). His legacy includes the massive California State Water Project, which boosted agriculture in the Central Valley and funneled water to Los Angeles; creation of the 1960 Master Plan for Higher Education along with an expansion of the state’s college and university systems; and various political reforms including creation of the Constitutional Revision Commission in 1962, which began the process of revising the state’s Constitution.²⁰ As this study has shown, postwar population growth prompted local governments and ultimately the state to seek a measure of control over rampant urban sprawl. Passage of the 1965 Williamson Act thus stands as another significant legislative achievement in California’s path of modernization under Pat Brown. Importantly, the Williamson Act placed implementation in the hands of local governments.

The role of local governments in the federal system is the least understood, and the literature tends to treat home rule as an arcane legal facet of federalism.²¹ This is understandable to a point because, legally, local units are creatures of the states.²² But, during the late nineteenth century and continuing steadily until the mid-1920s, many states sought “to reproduce on the state–local level some form of the constitutional federal–state division of power.”²³ Some observers of intergovernmental relations have acknowledged that the home rule movement changed American federalism, but there is little agreement as to the significance of that change. One

¹⁹ Scheiber, “Redesigning the Architecture of Federalism,” 285.

²⁰ See Ethan Rarick, *California Rising: The Life and Times of Pat Brown* (Berkeley: University of California Press, 2006).

²¹ I am speaking here of the broader home rule movement, not the narrowly conceived California movement to enact single tax amendments under the guise of home rule.

²² See Daniel R. Mandelker, et al., *State and Local Government in a Federal System*, Eighth Edition (Durham: Carolina Academic Press, 2010), 75–142.

²³ George C.S. Benson, *The New Centralization* (New York: Farrar and Rinehart, Inc., 1941), 117.

opinion holds that whatever significance the movement once had has been lost in the massive governmental bureaucracy encasing fiscal federalism, which has rendered local governments nearly powerless to govern many areas of American life.²⁴

Charles Abrams, however, argues that home rule proved to be the nemesis of New Deal public housing and town planning programs. Lower courts repeatedly challenged the federal government's power under the general welfare clause to undertake community building projects. The Roosevelt administration, moreover, opted not to appeal lower court rulings for fear that any negative high court ruling would undermine other New Deal social programs. To keep public housing and community planning programs from total failure, New Dealers retreated from the idea of direct federal control. The New Deal, according to Abrams, actually set the precedent for subsequent decentralized federal public housing programs with the 1937 Wagner–Steagall Act, which established a program “with the federal government now posited as the financier and subsidizer and the local housing authorities as the acquirers of land and the actual builders and managers.”²⁵

Similarly, the New Deal effort to establish state and sub-state regional planning, as well as the great experiment to establish multistate regional planning with the Tennessee Valley Authority, are silent testimony to the strength of state and local governments. The Roosevelt administration, in the end, enjoyed greater success with the Soil Conservation Service, which had only narrow resource conservation goals and which allowed local units to control implementation. The federal government provided technical support as well as financial assistance, but participation was strictly voluntary and subject to the commitment demonstrated by local soil conservation districts.²⁶

The states have played a considerable role in keeping the system non-centralized in certain policy areas. Abrams, on the one hand, considers the

²⁴ John G. Grumm and Russell D. Murphy, “Dillon’s Rule Reconsidered,” *Annals AAPSS* 416 (November 1974): 120–132.

²⁵ Charles Abrams, *The City is the Frontier* (New York: Harper and Row, 1965), 211–212, 238–249.

²⁶ See Douglas Helms, *Readings in the History of the Soil Conservation Service*, Historical Notes Number 1 (Washington, D.C.: U.S. Department of Agriculture, Economics and Social Sciences Division, 1992).

states as antagonizers who have displayed a willful disregard for the general welfare: “under the cloak of home rule and local autonomy, the state has passed down much of its own sovereign responsibilities to a myriad of local (mostly suburban) governments, each of which is concerned with its own welfare to the exclusion of its neighbor’s.”²⁷ Terry Sanford, on the other hand, agrees that states must take the blame for creating “municipal havoc,” but not because they ceded too much power to local governments. From his point of view, as one-time governor of North Carolina, the states were “slow to cede to the cities adequate powers to tax, zone surrounding areas, regulate housing, provide or require mass transportation, and acquire open space.”²⁸ Perhaps Joseph McGoldrick came the closest to capturing its essence when he wrote, in 1933, “The municipal home rule movement has never been aimed against the current tendencies toward centralizing and uniformity. It ignores them.”²⁹ In retrospect, the home rule movement assumed greater import than its adherents ever anticipated. Their initial concerns were narrow, often limited to freeing cities and states from organized corruption. State legislatures, moreover, often spent too much time deciding strictly local matters, some of them no more significant than determining the operating budget for some city’s fire department.

But home rule grew in ectopia. Between 1875 and 1924, sixteen states constitutionally granted home rule powers to municipal governments. The movement languished during the 1930s, then resumed during the 1960s. By 1980, most states allowed municipal home rule, and forty-three states allowed county home rule.³⁰ Legislators who framed earlier home rule

²⁷ Abrams, 211; for a similar view, see Lyle E. Schaller, “Home Rule — A Critical Appraisal,” *Political Science Quarterly* 76 (September 1961): 402–415.

²⁸ Sanford, 24.

²⁹ Joseph D. McGoldrick, *Law and Practice of Municipal Home Rule, 1916–1930* (1933; New York: AMS Press, Inc., 1967), 300.

³⁰ For good discussions of the home rule movement, see, in addition to McGoldrick, Frank J. Goodnow, *Municipal Home Rule: A Study in Administration* (New York: Macmillan and Co., 1895), Howard Lee McBain, *The Law and The Practice of Municipal Home Rule* (New York: Columbia University Press, 1916), and Lane W. Lancaster, *Government in Rural America*, second edition (New York: D. Van Nostrand Co., 1952), 309–310, and Benson, 116–123. For information on the number of states which have adopted home rule provisions, see National Municipal League, *Digest of County Manager Charters and Laws*, tenth edition (New York: National Municipal League, 1967); and ACIR, *State and Local Roles*, 156.

constitutional provisions, however, “never faced the problem of determining what matters [could] be best handled by local authority and what require[d] state action.”³¹ In short, home rule constituted a grant of power, but that power was, at best, vaguely conceived and described. As a practical result, local governments had the power to experiment with new forms of organization and administration, but courts often decided what constituted a legitimate exercise of local power. Case law surrounding home rule thus developed more-or-less independently in each state where city and/or county home rule is allowed. To be sure, not all cities or counties opt for a charter government if the choice is offered, but the existence of that constitutional privilege in many states spawned the *custom* of home rule, which “has played an important role in maintaining and developing the principle of decentralization.”³²

California courts determined that the municipal affairs of charter cities include the election and pay of municipal officials; the provision of water supplies and facilities, sewer facilities, fire protection, streets, parking, libraries, and public hospitals; the establishment of revenue bond procedures; and the right to impose business and other miscellaneous taxes.³³ These responsibilities constitute the sort of responsibilities for which municipalities logically should have authority. But the California Legislature also granted all city and county governments authority over two, more substantive, areas. The 1910 tax amendment not only mandated that the property tax would be reserved as the principal source of revenue for local government operations but, as implemented, gave local governments almost complete control over property tax administration until the early 1950s. The 1929 Planning Act, as amended in 1937, gave both city and county governments a mandate to assume authority over private land use. Most important, these home rule powers evolved outside a theoretical framework of American federalism, which accords local governments a fairly narrow sphere of power in the governmental system. The net effect of this legislation, however, was that, in California, it expanded home rule over local affairs for some local governments into local autonomy over private land use for all local governments.

³¹ McGoldrick, 3, 310–312.

³² Benson, 117.

³³ League of California Cities, 1965 report, 2.

Those who subscribe to the “quiet revolution in land-use controls” believe that federal and state legislation, beginning with the 1969 National Environmental Protection Act, represented a significant step toward centralizing control over land use and development.³⁴ Indeed, the environmental impact review process required for public, and some private, development projects; federal and state pollution control laws; and federal and state laws protecting environmentally sensitive areas such as wetlands, prairies, and coastlines, have helped to slow the pace of development. Environmental review processes also have helped to reshape the way in which American society collectively thinks about land development. The general public no longer considers it axiomatic that outlying shopping centers, sprawling suburban residential tracts, and vast industrial parks represent progress. But the “quiet revolution” is, to a very large degree, dependent on the actions of local governments and the courts.

As of the mid-1980s, the hope for a centralizing trend in land-use controls rested largely on developments in a handful of states. Hawaii, Oregon, Vermont, Florida, Wyoming, and Maine had enacted regulatory land development laws that attempted, in one fashion or another, to establish land policies framed in terms of state welfare and, in some cases, to forge links between fragmented local, state, and federal jurisdictions as well as goals. But none of these states enacted anything approaching a comprehensive land policy.³⁵ The California Land Conservation Act was, furthermore, emulated far more widely than state-level attempts to establish regulatory land-use controls. The CLCA, and all land conservation programs based on tax-relief incentives, represent what has been called the “unofficial system of land use control” which is more powerful than any official regulatory system so far devised.³⁶

The unofficial system of land conservation evolved with little historical connection to the older conservation movement, with its emphasis on efficient use and sustained yield, and it developed independently of the post-World War II environmental movement, which had a decided survivalistic

³⁴ See Don Hagan and Dean Misczynski, “The Quiet Federalization of Land Use Controls,” *Real Estate Appraiser* (September–October 1974): 5–9.

³⁵ *Ibid.*, passim.

³⁶ Norman Williams, “The Three Systems of Land Use Control,” *Rutgers Law Review* 25 (1970): 80–82.

thrust with its emphasis on environmental protection and human-scale technologies. Although environmentalists and planners endorsed tax incentives for land conservation, they had little to do with devising such programs. Yet land conservation became an item on environmentalists' political agenda.

There is considerable evidence, Samuel Hays argues, that "environmental values have expanded steadily [since World War II] in American society."³⁷ David Vogel concurs, observing that the "level of public consciousness about environmental, consumer, and occupational hazards" since the mid-1960s, "appears to be of a different order of magnitude" than that which prevailed during either the Progressive Era or the New Deal.³⁸ Grassroots activism surely has presented a formidable political challenge to all levels of government as well as to large-scale managerial systems in the private sector. Many environmental battles have been fought on the federal level; many more have been fought on the local and state levels. In a conclusion that echoes the view of Harry Scheiber, Hays posits that the "enhancement of state power and authority over local government was a major legacy of the environmental controversies of the 1960's and 1970's."³⁹

RESHAPING THE LEGAL CONTOURS OF THE WILLIAMSON ACT

If this is so, it is worth considering how this strengthening happened. Again, the Williamson Act is instructive, and it points to more than battles over what we think of as environmental controversies. A review of the legal

³⁷ Samuel P. Hays, "From Conservation to Environment: Environmental Politics in the United States Since World War II," *Environmental Review* 6, no. 2 (1982): 14–41.

³⁸ David Vogel, "The 'New' Social Regulation" in McGraw, *Regulation in Perspective*, 160.

³⁹ Samuel P. Hays, "The Political Structure of the Environmental Movement Since World War II," *Journal of Social History* 14 (Summer 1981): 729. Speaking more generally, Catherine H. Lovell notes that increases in federal grant-in-aid programs, in the conditions of aid, and in regulatory interventions (crosscutting regulations) have been accompanied by "increasingly active participation by state and local officials in political processes and in negotiations about the programs that affect them." She favors "working toward reforms in our system which empower the lowest levels of government, yet developing systems of articulated variety as needed to pursue broader policy objectives." See "Some Thoughts on Hyperintergovernmentalization" in Leach (1983), 95.

and legislative history pertaining to the Williamson Act since 1965 reveals a complex process that has incrementally shifted bits of power from the local to the state level. This final section attempts to fathom that process and its meaning by examining legal cases that percolated up to the appellate and supreme court levels along with significant amendments passed by the state Legislature. In some cases, court decisions directly influenced legislative action. This 30,000-foot view necessarily ignores scores of lower court rulings and minor legislative amendments, but it does enable one to discern an evolutionary process that transformed a purported state land-use policy from rhetoric to reality. It also enables one to discern the wrinkles of federalism in practice at the local and state levels.

Statewide coordination and oversight of the Williamson Act program rests with the California Department of Conservation, while local governments administer the program and retain discretionary power to establish more stringent program rules. Participation in the Williamson Act program also is voluntary, and, as of 2016, fifty-two of California's fifty-eight counties were participating.⁴⁰ Under the act's provisions, participating local governments must first establish agricultural preserves, within the boundaries of which landowners may take advantage of preferential property tax assessment based on the land's actual use for agriculture (using a capitalization of income formula) instead of the land's potential market value. To receive preferential assessment, a landowner must enter into a contract with the appropriate county or city and agree to maintain the land in agricultural use or related open space for a minimum of ten years. Contracts self-renew annually unless and until the landowner or the local government gives notice of non-renewal. In this event, a ten-year phase out period begins, during which time the use restrictions remain in place but the tax advantage is gradually withdrawn. In 1998, the Legislature added new provisions to the Williamson Act enabling landowners to receive even greater preferential tax advantages by placing land in a Farmland Security Zone and entering into twenty-year contracts.⁴¹

⁴⁰ *2016 California Land Conservation Act Status Report* (California Department of Conservation, Division of Land Resource Protection, December 2016), 1. Status reports, published every two years, hereafter are cited as *CLCA Status Report* with the relevant year.

⁴¹ *California Government Code*, Section 51296 et seq.

After the Williamson Act went into effect, land enrollments were steady and reached a total of approximately six million acres in 1970. Enrollments jumped a bit after passage of the Open Space Subvention Act in 1971, which authorized the state to partially reimburse local governments through subventions for lost property tax revenue from agricultural land under contract.⁴² The figures then climbed steadily throughout the 1970s, reaching a plateau of roughly sixteen million acres in 1980. This figure represents about half of the state's agricultural land. Since then, the total acreage under contract has fluctuated from year to year as some contracts expire and other lands are placed under contract, but sixteen million acres was a stable approximate figure until 2009, when the state suspended, then eliminated, subvention payments because of revenue shortfalls produced by the Great Recession that began in 2008.⁴³ For the period 2010–2016, the total acreage figures are less reliable because several counties stopped reporting enrollment data on a regular basis. Nonetheless, the estimated statewide average enrollment figure from 1990 to 2015 held at nearly sixteen million acres.⁴⁴ Importantly, when subvention payments were ended, the state Legislature modified the basic program structure by reducing the minimum rolling contract period from ten to nine years for the regular Williamson Act program, and from twenty to eighteen years for land in the Farm Security Zone program.⁴⁵ This change appears to have mitigated the loss of subvention payments, at least in the short term.⁴⁶

The Williamson Act is constantly challenged in court, although relatively few cases reach the higher courts. Likewise, in every session the state

⁴² *California Government Code*, Section 16141 et seq.

⁴³ *California Statutes*, 2008, Chapter 751 (AB 1389) suspended subvention funding as part of overall cuts to the state budget; *California Statutes*, 2009, Chapter 1 (AB X-4) made the suspension permanent.

⁴⁴ 1990–91 *CLCA Status Report*, 17–18; table entitled “Land Conservation (Williamson) Act Enrollment, 1990–2015,” California Department of Conservation website, under Current and Historic Data About Land Conservation (Williamson) Act Status, www.conservation.ca.gov/dlrp/lca/stats_reports/Pages/index.aspx.

⁴⁵ *California Statutes*, 2010, Chapter 722 (SB863) created an option for participating jurisdictions to recapture a portion of foregone tax revenue by decreasing the contract length by one year; *California Statutes*, 2011, Chapter 90 (AB 1265) renewed that option until January 2016; *California Statutes*, 2014, Chapter 322 (SB 1353) made the option permanent.

⁴⁶ 2014 *CLCA Status Report*, 2.

Legislature considers bills to amend the law in minor as well as major ways. Overall, litigation has served to strengthen the act and, in general, make local administration more consistent from county to county and with the state policy goals articulated in the original legislation.

Early court cases upheld the discretionary power of local governments. In *Kelsey v. Colwell* (1973), the first case to reach the appellate court level, the Fifth District Court of Appeal upheld the discretionary intent of the law with respect to county participation. Horace Kelsey and other agricultural landowners had sought to compel the Merced County Planning Director, Hal F. Colwell, to establish an agricultural preserve and implement the Williamson Act. The court ruled that the permissive language of the law — i.e., that any county or city *may establish* agricultural preserves — was intentional, and that local governments were not mandated to implement the provisions of the Williamson Act. The appellate court also noted that in 1970 and again in 1971, the state Legislature had rejected proposed amendments that would have substituted the word “shall” for “may” in two pertinent sections of the law.⁴⁷

In the 1980s, however, higher courts began to define the limits of local discretionary power inscribed in the legislation. In 1981, the California Supreme Court ruled, in *Sierra Club v. City of Hayward*, that local governments must take the “public interest” into account in considering landowner requests for Williamson Act contract cancellations. The Sierra Club and others filed suit after the City of Hayward granted landowners Charles and Helen Soda a partial contract cancellation to develop a residential subdivision on a 93-acre portion of their cattle ranch, situated in the foothills on the eastern edge of the City of Hayward. The cancellation allowed the landowners to escape the property tax consequences that would have ensued had they given notice of nonrenewal and gone through the ten-year phase out period. Trial proceedings exposed lax planning on the part of the city, including the dismissal of alternative development sites identified in a pertinent environmental review document, but the Supreme Court’s ruling called particular attention to a section of the Williamson Act that addressed the term “public interest” in relation to contract cancellation provisions. Acknowledging that “public interest” is an imprecise term, the

⁴⁷ *Kelsey v. Colwell*, 30 Cal. App. 3d 590 (1973).

court went on to point out that the Legislature had anticipated disputes over its meaning and thus provided reasonably clear guidance for determining “which ‘public’ and what ‘interests’ [were] to be considered” in making contract cancellation decisions. Specifically, the court emphasized that the Legislature justified the need for the Williamson Act “in part by a concern for ‘the agricultural economy of the state . . . [and] for the assurance of adequate, healthful and nutritious food for future residents of this state and nation.’” This led the court to stipulate that “any decision to cancel land preservation contracts must therefore analyze the interest of the public as a whole in the value of the land for open space and agricultural use.” In a split decision, the majority opinion held that the city had not considered the interests of the public as a whole and not followed either the spirit or letter of the law, which was written to assure that contracts met the constitutional requirement of an “enforceable restriction” so that landowners could not escape their contractual obligations whenever an opportunity for more profitable land use came along.⁴⁸

Sierra Club v. City of Hayward touched off a new round of legislative and judicial action. The 1981 Robinson Act affirmed the restrictive language of the Williamson Act but authorized a one-year “window” to “correct inconsistent applications” of the contract cancellation provisions, during which time landowners could ask for cancellation under relaxed criteria. The California Farm Bureau Federation, League of California Cities, California Association of Realtors, County Supervisors Association, California Building Industry Association, and California Council for Environmental and Economic Balance vigorously supported passage of the Robinson Act. Under the window provision, requests for contract cancellations had to meet only two criteria: that urban development was contiguous to a parcel under Williamson Act contract and that a proposed alternative use was consistent with the applicable general plan. In 1983, the Legislature passed another amendment to require that notices of cancellation be given to the Department of Conservation.⁴⁹

⁴⁸ *Sierra Club v. City of Hayward*, 28 Cal.3d 840 (1981).

⁴⁹ Dale Will, “The Land Conservation Act at the 32 Year Mark: Enforcement, Reform, and Innovation,” *San Joaquin Agricultural Law Review* 9, no. 1 (1999): 28–9; “Historical Background” section of *Honey Springs Homeowners Assn v. Board of Supervisors*, 157 Cal. App. 3d 1122 (1984); *California Statutes*, 1981, Chap. 1095; *California*

A highly controversial lawsuit involving so-called window cancellations quickly followed. After the San Diego County Board of Supervisors cancelled three Williamson Act contracts to allow the development of a clustered community of 389 high-end homes with an eight-acre commercial district and a seventeen-acre artificial lake, Honey Springs Homeowners Association, Inc. and the Sierra Club sued, charging that the Board of Supervisors, by cancelling the contracts, was promoting discontinuous patterns of urban development. Of note here, the proposed development was located eight miles southeast of the “urban limit line” for the San Diego metropolitan area in the county’s general plan, but the supervisors approved the cancellations because the development project was categorized as “rural” — as allowed under the general plan — and the land itself was properly categorized as rural. Thus, the supervisors held that the proposed alternative use, i.e., a clustered residential-commercial development, was consistent with the general plan and with the relaxed cancellation criteria in effect during the one-year window of the Robinson Act amendments.⁵⁰ Although the California Office of Planning and Research called the proposed project “leap-frog urban development,” a term long used by planners, San Diego County, through its general plan, was allowing the same effect under the disingenuous category of “rural” development.

Because the proposed project was consistent with the county’s general plan, the appellate court addressed a narrower legal question: whether the Honey Springs project, “defined as rural development under [a] general plan enacted to control county developmental growth patterns . . . necessarily could not create a discontinuous pattern of urban development as that term is used in the Williamson Act, an enactment involving different far-reaching statewide concerns.”⁵¹ In a lengthy opinion, the appellate court held that the proposed development could only be construed as “urban.” Although the residential density was quite low, approximately five

Statutes, 1983, Chap. 864. See also Dan Walters, “Punching Holes in the Williamson Act,” *California Journal* 14 (December 1983): 459–461 and Ann Foley Scheuring, “The Rising Power of the Farm Lobby,” *California Journal* 13 (November 1982): 411–413.

⁵⁰ “Factual and Procedural Background,” section of *Honey Springs Homeowners Assn. v. Board of Supervisors*, 157 Cal. App. 3d 1122 (1984).

⁵¹ “The Legal Controversy” section of *Honey Springs Homeowners Assn. v. Board of Supervisors*.

acres per home site, and the development would include abundant dedicated open space, the proposed development also called for “approximately 15 miles of roads, a fire station, equestrian facilities . . . and a commercial service center approved without limitation as to the size or number of commercial buildings.” Additionally, the project would require “importing water through a 12-mile main, with attendant pumping facilities and storage tanks, and a sewage treatment plant with the capacity to process .12 million gallons per day.” In addition to placing a burden on existing public services and school districts, the court called attention to the adverse environmental effects of excavation for 389 home sites and fifteen miles of roadways, the visual impact of a sewage plant to be constructed along Honey Springs Road, the likelihood of runoff causing downstream erosion, the traffic and pollution impacts of an estimated 2,700 daily automobile trips, and unintended impacts on wildlife.⁵²

Two years later, in *Lewis v. City of Hayward* (1986), the First District Court of Appeal buttressed the *Honey Springs* decision by ruling that “the window provisions must be construed narrowly and against cancellation in accordance with the objectives of the Williamson Act” to meet the constitutional requirement for enforceable contract restrictions.⁵³ These two cases sent a strong signal to counties and cities that the higher courts stood ready to make local governments uphold the Williamson Act to stem the tide of leap-frog residential subdivisions.

Two other cases in the 1980s involved assessment actions. Under the 1971 Open Space Subvention Act, which provided partial replacement of tax revenues to local governments, the secretary of the Resources Agency was given authority to review local agency decisions to waive or reduce contract cancellation fees. In *Dorcich v. Johnson* (1980), a landowner in Santa Clara County challenged this provision, arguing that with the 1971 amendment, the Legislature intended to give local agencies the authority to make unfettered decisions regarding the local tax base. The First District Court of Appeal disagreed, holding that “the state has a direct financial interest in the cancellation fees” and, further, that the Legislature intended

⁵² “The Honey Springs Project is ‘Urban’ Development” section of *Honey Springs Homeowners Assn. v. Board of Supervisors*.

⁵³ *Lewis v. City of Hayward*, 177 Cal. App. 3d 103 (1986); Will, “The Land Conservation Act at the 32 Year Mark,” 24.

for the secretary to act on behalf of the state to “insure that the statewide purpose of conserving agricultural land is fulfilled.”⁵⁴

Another lawsuit addressed the effect of Proposition 13 on tax assessment of agricultural land removed from the Williamson Act program. Passage of Proposition 13 in 1978 altered the state Constitution to allow differential property taxation for the purpose of protecting a class of existing property owners from the tax consequences of an upward spiraling real estate market. The lawsuit in question stemmed from actions taken by the City of Stockton in 1977, when it annexed four parcels (approximately 120 acres) under Williamson Act contracts and rezoned the land for residential use. Under the provisions of Proposition 13, the tax assessor reassessed the land at its earlier fair market value, which resulted in a substantial property tax increase. The landowner appealed to the Board of Equalization, claiming that under the rollback provision of Proposition 13, the assessor should have used the use value in effect when the land was placed under contract. The Board of Equalization granted the landowner’s appeal, in response to which the tax assessor sought redress from the appellate court. The Third District Court of Appeal reversed the board’s decision, holding that even though Proposition 13 intentionally altered the principle of equitability in property taxation, there was “nothing in the background of Proposition 13 either pro or con” to suggest that “such disparity was intended to result from artificially depressed assessments pursuant to Williamson Act contracts no longer in existence.”⁵⁵

From the very beginning, annexation actions plagued effective administration of Williamson Act contracts covering land on the urban fringe. Very few complaints reached the higher courts, but the Legislature attempted to address these issues in the 1990s.⁵⁶ When the law was passed in

⁵⁴ *Dorcich v. Johnson*, 110 Cal. App. 3d 487 (1980).

⁵⁵ *Shellenberger v. Board of Equalization*, 147 Cal. App. 3d (1983). Passage of Proposition 13 in 1978 had raised concerns that it would greatly limit the tax relief available to agricultural landowners under the Williamson Act, and the number of enrolled acres would drop precipitously, but the effect turned out to be negligible.

⁵⁶ One exception is an unpublished case, *Irval W. Carter et al., v. City of Porterville*, Nos. F016777, F017555, and F018190, Court of Appeal, Fifth District, August 19, 1993. In this case, which turned on other legal issues, the appellate court incidentally held that a Williamson Act contract remained in effect even though the City of Porterville had filed a blanket protest when the contract was executed.

1965, Assemblyman Williamson had deflected an eleventh-hour attempt to insert a provision giving cities the right to block the enrollment of agricultural lands within three miles of their incorporated borders. However, a 1968 amendment permitted cities to protest the execution of Williamson Act contracts within *one mile* of their borders. Filing a protest enabled a city, if it decided to annex enrolled land, to terminate Williamson Act contracts.⁵⁷ In 1990, the Legislature then repealed the 1968 amendment because cities were interpreting the provision with excessive liberality, and landowners on the urban fringe were reaping tax windfalls.⁵⁸ This was allowed to happen when a city or county cancelled a Williamson Act contract but did not require the landowner to pay property taxes retroactively based on market-value assessment. Despite the repeal, according to Dale Will, former staff counsel for the Department of Conservation, cities continued, at least through the 1990s, to annex lands in the Williamson Act program and allow development without going through proper contract termination procedures. The reason for this state of affairs, in Will's opinion, was that city planning departments, unlike county planning departments, were generally unaware of Williamson Act requirements and often failed to check for the possible existence of contracts. As a result, the Legislature passed further amendments in 1998 to establish administrative procedures for proper handling of Williamson Act contracts when cities annexed land.⁵⁹

The matter of determining "compatible use," largely undefined in the Williamson Act, *was* the object of both litigation and legislation in the 1990s.⁶⁰ During the 1980s, the Department of Conservation reportedly was "besieged with review of 'compatible use' proposals including race tracks, hotels, country clubs, large scale mining, and concrete plants." The department thus initiated legislation to establish limits on what constituted

⁵⁷ *California Statutes*, 1968, Chapter 413, Section 2.

⁵⁸ *California Statutes*, 1998, Chapter 841 (AB 2764); Will, "The Land Conservation Act at the 32 Year Mark," 11–12.

⁵⁹ Will, "The Land Conservation Act at the 32 Year Mark," 13–14.

⁶⁰ *California Government Code*, Section 51238, simply specified that the "erection, construction, alteration, or maintenance of gas, electric, water, communication, or agricultural laborer housing facilities" were deemed "compatible uses" and that land so used could not be excluded from agricultural preserves.

compatibility. Bills introduced in 1991 and 1992 failed.⁶¹ In the meantime, the Stanislaus Audubon Society filed suit against Stanislaus County after the Board of Supervisors approved a huge recreational complex proposed for development on 600 acres of the 2,500-acre Willms Ranch, much of which was under Williamson Act contract. The proposed project included a twenty-seven-hole golf course, four tennis courts, a swimming pool and cabana, a clubhouse with meeting facilities, proshop, and a restaurant, and a maintenance facility. Although the county planning department initially had determined that the project would have significant environmental effects and the Department of Conservation had determined that the project was inconsistent with Williamson Act requirements, both the planning department and ultimately the Board of Supervisors approved the project, and a full environmental assessment was never conducted.⁶²

After Stanislaus County denied an appeal by the Stanislaus Audubon Society, the Audubon Society took its grievance to the Fifth District Court of Appeal. The appellate court considered two related matters: whether the county had failed to meet its obligations under the California Environmental Quality Act (CEQA) and whether the development project was compatible with the Williamson Act. After finding ample evidence that the county had knowingly circumvented the preparation of an environmental impact report, the court reversed the county's decision "pending certification of a legally sufficient EIR." Because the weight of evidence concerning the county's breach of law under CEQA was so great, the court held that it was not necessary to consider the question of compatible use under the Williamson Act.⁶³

The appellate court's decision not to consider compatible use in *Stanislaus Audubon Society v. County of Stanislaus* prompted the Department of Conservation to initiate another bill, AB 2663, which passed the Legislature in 1994. AB 2663 amended the Williamson Act to stipulate, in the negative, that compatible uses cannot harm soil fertility, obstruct or displace potential agricultural operations, or induce non-agricultural development of surrounding enrolled lands.⁶⁴

⁶¹ Will, "The Land Conservation Act at the 32 Year Mark," 15.

⁶² *Stanislaus Audubon Society, Inc. v. County of Stanislaus et al. and Willms Ranch*, 33 Cal. App. 4th 144 (1995).

⁶³ *Ibid.*

⁶⁴ Will, 16–18; *California Statutes*, 1994, Chapter 1251.

Another 1990s case involving the Stanislaus County tax assessor led to new legislation significantly enhancing the intent of the Williamson Act. In 1993, the Diablo Grande Limited Partnership submitted an application to Stanislaus County requesting cancellation of Williamson Act contracts covering approximately 5,000 acres of grazing land to develop a luxury town site which included a destination resort complex, a winery, 2,000 homes, and associated commercial uses. After the Board of Supervisors approved the cancellation, the tax assessor calculated the cancellation fee on the value on the land's use value for dry-land farming rather than its fair market value, a clear violation of statutory law. The California Resources Agency first brought suit in the Stanislaus County Superior Court seeking to force the county to follow the law. When the Superior Court dismissed the case on technical grounds and also ruled that the Resources Agency did not have standing to sue, the agency took its case to the Fifth District Court of Appeal, which affirmed its standing to bring suit on behalf of the State of California. Stanislaus County surely recognized that it had overstepped its discretionary powers under the Williamson Act because, before the case went to trial, the county and Diablo Grande settled out of court. Under the terms of settlement, Diablo Grande agreed to place 3,500 acres under a permanent conservation easement to be administered by the West Stanislaus Resource Conservation District.⁶⁵

The Diablo Grande settlement, along with passage of the Agricultural Lands Stewardship Program Act (ALSP) in 1994, emboldened the Resources Agency to seek another amendment to the Williamson Act. SB 1240, which passed in 1997, stipulated that lands enrolled in the Williamson Act program and that qualified for contract cancellation could be removed if comparable lands were placed under a permanent conservation easement.⁶⁶ A year later, the Legislature passed SB 1182, which authorized local governments to create farmland security zones (FSZ) within which agricultural landowners with existing Williamson Act contracts could convert them to twenty-year

⁶⁵ *People ex rel. Department of Conservation v. David Triplett and Diablo Grande Limited Partnership*, 55 Cal. Rptr. 2d 620, 625 (Ct. App. 1996); Will, 30–31.

⁶⁶ Will, 31–33; *California Statutes*, 1997, Chapter 485. Since 2009, conservation easements have been monitored by the California Farmland Conservancy Program, separate from the Williamson Act Program but still within the Department of Conservation, Division of Land Resource Protection.

contracts. Landowners with twenty-year contracts, in return, receive greater preferential tax treatment. Sometimes called the Super Williamson Act, SB 1182 also included restrictions designed to prohibit local governments and special districts from annexing enrolled lands in farmland security zones.⁶⁷ As of 2015, a total of 866,355 acres of land were under FSZ contracts. Another 60,493 acres were protected by conservation or open space easements. These combined figures, less than one million acres, represent approximately six percent of all land enrolled in the Williamson Act program.⁶⁸

More recently, appellate courts have heard cases revealing the sometimes difficult choices that must be made in determining which land uses are in the best public interest. *Friends of East Willets Valley v. County of Mendocino* (2002) raised several legal issues, including whether the county acted improperly in cancelling a Williamson Act contract to allow the Sherwood Valley Rancheria (a Pomo Indian tribe) to construct badly needed low-income housing on a small, upland portion of a 160-acre parcel. In return for contract cancellation, Sherwood Valley Rancheria signed a covenant with the county agreeing to comply with the terms of the former Williamson Act contract covering agricultural use on fifty-three acres of prime bottomland until September 30, 2007, when the contract would have expired. The First District Court of Appeal, in reversing a trial court, ruled that the county had “made the necessary findings and its findings were supported by substantial evidence” in reaching its decision that another public concern, i.e., public housing, outweighed public interest as expressed in the Williamson Act and contract cancellation was therefore justified.⁶⁹

In *County of Colusa v. California Wildlife Conservation Board* (2006), the Third District Court of Appeal observed that “there may be environmental costs to an environmentally beneficial project.” In this case, Colusa County challenged the legality of actions taken by the California Department of Fish and Game, through the California Wildlife Conservation Board (CWCB),

⁶⁷ Will, 33–34; *California Statutes*, 1998, Chapter 353. As of January 1, 2000, non-contracted land may go directly into an FSZ contract.

⁶⁸ 2014 *CLCA Status Report*, 2–3; 2016 *CLCA Status Report*, 16–17. It is not clear how many acres of farmland, total, were converted from Williamson Act contracts to conservation or open space easements, which are now monitored by the California Farmland Conservancy Program; see note 66.

⁶⁹ *Friends of East Willits Valley v. County of Mendocino (Sherwood Valley Rancheria)*, 123 Cal. Rptr. 2d 708 (2002).

when the state agency purchased a conservation easement on 225 acres of prime agricultural land owned by Leroy Traynham. He had previously entered into a Super Williamson Act contract with Colusa County, which required that land use be restricted to the “production of food and fiber for commercial purposes and uses compatible thereto” for a period of twenty years. Conversely, CWCB’s conservation easement, which was for creating a managed wildlife habitat, expressly prohibited the cultivation of agricultural crops for commercial purposes. Colusa County charged that the CWCB had violated procedures required under both CEQA and the Williamson Act. Before the case was fully adjudicated, however, the landowner and the CWCB negotiated a settlement with the county whereby the CWCB conservation easement was amended to allow livestock grazing on the property, which brought the proposed new use into compliance with the compatible use provision of the Williamson Act.⁷⁰

In a case that augered well for the solar energy industry, *Save Panoche Valley v. San Benito County*, the Sixth District Court of Appeal ruled that the public benefit of a proposed solar farm outweighed the public benefit of livestock grazing land. After San Benito County approved cancellation of Williamson Act contracts on approximately 7,000 acres of grazing land for a solar farm, the Santa Clara Valley Audubon Society and the Santa Clara Sierra Club (as “Save Panoche Valley”) sued the county, challenging the adequacy of its findings under both the Williamson Act and CEQA. In this instance, the appellate court determined that the county had followed legally required review protocols and the findings of such — which resulted in scaling back the project scope to satisfy environmental concerns and creating agricultural conservation easements around the project site — amply justified the county’s decision.⁷¹ Corresponding legislation, which took effect in 2013, now allows counties to cancel a Williamson Act contract on land that is contaminated or otherwise environmentally compromised and replace it with a solar-use easement.⁷² As of 2016, approximately twenty-five solar-use cancellation petitions had been submitted statewide,

⁷⁰ *County of Colusa v. California Wildlife Conservation Board, et al.*, 145 Cal. App. 4th 637 (2006).

⁷¹ *Save Panoche Valley, et al. v. San Benito County*, 217 Cal. App. 4th 503 (2013).

⁷² *California Statutes*, 2011, Chapter 596 (SB 618).

although only three projects had been completed.⁷³ The good news is that California has an abundance of agricultural and open-space lands available for siting solar farms. The not-so-good news is that solar-production companies want level sites, which often means prime agricultural land.

Although this review of higher court decisions covers only a fraction of the court cases pertaining to the Williamson Act, it is sufficient to conclude that fifty years of litigation and related legislative amendments have allowed the principle of home rule to stand but significantly constrained the power of local governments to weaken state policy. As the Department of Conservation's biennial status reports have stated since 2012, "a three-way relationship between private landowners, local governments, and the State is central to the success of the Program."⁷⁴ This was not the case in 1965 when the Legislature passed the Williamson Act. At that time, the role of the state was limited to statewide coordination and minimal oversight. Now the Department of Conservation speaks of the Williamson Act program as a "partnership" to administer what has become a complex set of statutes and regulations.

Over the decades, the state's role has changed considerably. Importantly, passage of the 1971 Open Space Subvention Act gave the state a financial stake in administering the Williamson Act program. Up until 2009, when the state suspended, then abandoned, subvention payments, the total cumulative value of subventions to counties and cities participating in the Williamson Act program was more than \$863 million, averaging at \$1.48 per acre per year.⁷⁵ Additionally, the 1970 California Environmental Quality Act and other environmental laws and regulations have required tremendous growth in the state bureaucracy for administrative purposes. The Division of Land Resource Protection of the Department of Conservation, which has administrative responsibility for the Williamson Act program, also administers other programs to conserve farmland and open space, including the Agricultural Land Mitigation Program, the Sustainable Agricultural Lands Conservation Program, and the California Farmland Conservancy Program. The effect, over time, has been to re-cast the

⁷³ 2016 CLCA Status Report, 8.

⁷⁴ 2012 CLCA Status Report, 3; 2014 CLCA Status Report, 5.

⁷⁵ 2016 CLCA Status Report, 8.

purposes of the Williamson Act more broadly to include the preservation of open space.⁷⁶

The courts also have helped to strengthen the state's role by serving as watchdogs for the broader public interest. In this respect, it should be noted that two environmental groups, the Sierra Club and the Audubon Society, have played important roles in litigation that has helped to reshape the contours of the Williamson Act. *Sierra Club v. City of Hayward* led to a brief period when contract cancellation restrictions were loosened, but, more importantly, it upheld the constitutional requirement of an enforceable restriction in Williamson Act contracts to justify preferential tax treatment. The *Honey Springs* and *Lewis v. City of Hayward* decisions added bricks to this wall; they also sent a strong message to local governments about complying with the intent of the Williamson Act when it came to formulating and administering their own general plans. The *Diablo Grande* settlement provided a model for establishing conservation easements and led to legislation authorizing Super Williamson Act contracts in farm security zones. In the aggregate, litigation and legislative amendments have substantially increased the state's oversight responsibility.

Still, the long-term viability of this three-way partnership may rely, at least in part, on the power of the purse. Following the suspension of subvention payments, Imperial County gave notice of nonrenewal for all Williamson Act contracts in its jurisdiction. When these contracts expire, approximately 138,500 acres will leave the program. Imperial County is not one of the state's leading agricultural producers, and so far no other county has announced wholesale withdrawal from the program, but there are other signs that the loss of subvention funding has driven a wedge in the supposed partnership. After the state pulled subvention funding, a number of counties either stopped reporting data to the Department of Conservation for the required biennial reports or began reporting data inconsistently. As of 2015, the number of non-reporting counties stood at ten, nearly one-fifth of participating counties with a combined estimate of 1.3 million acres under Williamson Act contract.⁷⁷ While this does not mean these counties plan to drop out of the program, which after all is voluntary, it does signal a

⁷⁶ See California Department of Conservation website at http://www.conservation.ca.gov/dlrp/lca/basic_contract_provisions/Pages/wa_overview.aspx.

⁷⁷ 2016 CLCA Status Report, 8.

push-back of sorts at the local level. Without the carrot of subvention payments, a sizeable number of counties apparently are protesting the loss of subvention funds or are disinclined to comply with program requirements that now seem burdensome in some way, or both.

To be clear, the Williamson Act program seems to be working as well as it ever has to conserve agricultural land despite the loss of subvention funds to counties and cities. Eleven counties have taken advantage of the option to reduce the length of contracts by one year, indicating that there is still reasonably strong support for agricultural land conservation at the local level and that local governments will work around the loss of property tax revenues from lands under Williamson Act contracts. What has changed is the state's financial stake in the program, and without this the relative power of the Department of Conservation to monitor the program effectively has been diminished. The power balance has once again shifted a bit, and local governments have started to flex their muscles.

In the larger picture, the current status of the Williamson Act program points once again to the significance of local governments in the federal system and underscores the mutability of federalism. It also points to the importance of the judicial system in the dynamics of intergovernmental relations. Over the past five decades, the courts have played a significant role by interpreting the law in ways that have strengthened the intent of the Williamson Act and elevated its standing as state policy. California seems to be reaching a crossroads in terms of how vigorously its agricultural land conservation policy will be implemented in the future, but surely the courts will continue to play a role in forging the path forward.

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ENVIRONMENTAL
LAW

ORAL HISTORY SECTION

From the Oral History of
JOHN ZIEROLD
*Environmental Lobbyist in California's Capital,
 1965–1984*

An interview conducted by Ann Lage in 1984 for the Regional Oral History Office, The Bancroft Library, UC Berkeley.¹

LAGE: Let's turn our attention now to CEQA [California Environmental Quality Act] which passed in 1970.

ZIEROLD: Jack Knox was the author of the bill.

LAGE: I didn't find too much information about how that came about or what role the club might have had.

¹ Presented here is a brief excerpt from John Zierold, "Environmental Lobbyist in California's Capital, 1965–1984," an oral history conducted in 1984 by Ann Lage, Sierra Club History Series, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1988. © 1988 by the Regents of the University of California and the Sierra Club. Underwritten by The National Endowment for the Humanities and the Sierra Club.

The oral history excerpts in this "Environmental Law — Oral History" section are intended to provide personal commentaries on the topics discussed in the preceding Environmental Law "Articles" and "Book" sections. This excerpt relates to the articles: Kathryn Mickle Werdegar, *The California Environmental Quality Act at 40*; and Darren F. Speece, *From Corporatism to Citizen Oversight: The Legal Fight Over the California Redwoods, 1969–1999*; both in this volume, 13 CAL. LEGAL HIST. 3 and 57 (2018).

ZIEROLD: The club had a very important role in that, as it has in almost any major environmental bill. What was the number? AB 2045. There was never any doubt in our mind that the California Environmental Quality Act paralleled the national Environmental Protection Act. The Assembly, under Bob Monagan's leadership, had set up a Select Committee on the Environment, which shows you how things have changed. Bob Monagan is a moderate to conservative Republican. Sort of halfway between those two arcs in the spectrum. Most Republicans prior to 1970 had been indifferent, not hostile necessarily, but more or less indifferent to environmental issues. And in 1970 there was an abrupt change.

George Miliias, a liberal Republican from Gilroy, was chairman of the Assembly Natural Resources Committee, always had been a good vote on it, stayed that way, very much concerned over wildlife matters, good on land-use planning and on coastal issues. He was chairman of the select committee. This was, under Monagan's leadership, a plan to put some environmental regulations on the books in a way consistent with what the federal government had done. We were really the first state to do this. We even had an environmental bill of rights, carried by George Miliias, which did not pass but came very close.

At any rate, the California Environmental Quality Act came out of the select committee, passed the policy committee — Jack Knox was author — sailed out of the Assembly and went through the Senate without too much difficulty. It was only after the State Supreme Court decision on *Mammoth* that troubles began with it.

LAGE: When it passed, did you see it as a major piece of legislation that would change?

ZIEROLD: Yes, unreservedly so.

LAGE: The Legislature apparently didn't look that closely at it.

ZIEROLD: No.

LAGE: Did you always feel CEQA applied to private projects?

ZIEROLD: No question about it. Then the *Friends of Mammoth* decision [September 1972].² That suit was brought originally by Andrea Mead

² *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247 (1972).

Lawrence, a skier who had been on the U.S. Olympic team and lived in Mammoth. She objected to a housing development over there and brought suit under the Environmental Quality Act and won. The case went all the way to the Supreme Court. In the deliberations and in the decision, there is something called “footnote 8,” which spells out the requirements that there be feasible alternatives and mitigation measures studied and adopted by the permitting authority.

What happened then was that the financial institutions and the general contractors and the real estate people and anybody engaged commercially in putting two sticks of wood together descended on the Legislature in a panic. That resulted in another bill to clear up the situation. We had long and rancorous discussions. By that time Bob Moretti was speaker. About two years later.

LAGE: '72.

ZIEROLD: '72. But for the first two years things were moving along without too much difficulty.

LAGE: Well, not too much was done in those two years.

ZIEROLD: No, not too much was done. It wasn't until the *Mammoth* decision.

LAGE: The Reagan administration had begun to set up some guidelines, which I guess nobody liked very well.

ZIEROLD: The guidelines were put together by the secretary for resources, who was given responsibility to do that. Those guidelines would include categorical exemptions. A suit was brought on a couple of them. Categorical exemptions six and seven dealt with exempting pesticides. That was what the Reagan administration wanted at the insistence of the Department of Food and Agriculture, but that was challenged in the courts and struck down. So they were not exempted.

LAGE: So the *Friends of Mammoth* decision dealt with the fact that CEQA applied to private projects as well as public?

ZIEROLD: That's right.

LAGE: Now what about these questions of mitigation measures?

ZIEROLD: In the Supreme Court decision, finding for *Friends of Mammoth*, they prepared footnotes. And footnote 8 is the one that is key. It states that it is necessary to study feasible alternatives to any project and also that feasible mitigation measures be adopted.

LAGE: But this wasn't in the legislation?

ZIEROLD: Yes, it's in the legislation, obviously. The argument had been made in the Senate after this decision that the members of the Governmental Organization Committee thought it only applied to public works and not to private projects. I guess it's because they didn't read the bill very carefully.

LAGE: What about Evelle Younger? His environmental unit?

ZIEROLD: Well, at that time. Younger, of course, was attorney general. He had an environmental unit headed by Nick Yost and including Louise Renne, and Clem Chute, and I believe, Jan Stevens. Alexander Henson also served on it.

LAGE: Now, who are all these people?

ZIEROLD: They were brilliant young attorneys dedicated to environmental ideals. And they were very, very effective.

LAGE: And what about Younger himself?

ZIEROLD: Younger was committed to the California Environmental Quality Act. And he stood by that in the face of very severe criticism from commercial interests and poobahs in the Republican party. But he wouldn't back down.

LAGE: He obviously agreed with the way the environmentalists had read the act?

ZIEROLD: The CEQA enjoyed the protection of the Attorney General's Office. That made a difference with the Legislature too. First of all, the Legislature was under the leadership of Leo McCarthy in the Assembly and Mills in the Senate. In the latter part of 1970, it had been Howard Way, Jack Schrade, and then Jim Mills. In the Assembly it was Bob Moretti at first, and then Leo McCarthy.

With Moretti, there was a willingness to try to modify CEQA, to remove uncertainty on the part of lenders. That too, I suppose, looking back

at it, is not altogether unreasonable because if you haven't got investor confidence, there isn't financial backing for worthy projects that are beneficial to the economy. This was not a matter of the robber barons or the polluters wanting to be protected. Most investors were unsure of the time delays. And there could be substantial time delays, sometimes two years before a project could be approved. For investors to put money into a project and then have to wait two years, with no certainty as to whether or not the project was going to go forward, was more than they were willing to accept as risk. When they did their risk analysis on the investment and study of return on investment, and all the other decisions that investors have to make, they saw the picture being very clouded and wanted it cleared up.

They wanted a moratorium on CEQA until these questions could be answered or until such time as the bill could be rewritten to provide investor confidence.

LAGE: So this is the immediate response to the *Friends* decision, a moratorium.

ZIEROLD: A moratorium was wanted. What we did was to give up on a moratorium idea, protect existing lawsuits, and go through with some minor curative measures on AB 889 (Knox).

LAGE: AB 889 was not a moratorium, not a rollback of any kind?

ZIEROLD: Right.

LAGE: And then what attempts came after that to alter the CEQA?

ZIEROLD: They tried to exempt all private developments from that point on. Those efforts failed. There were also attempts to create some changes in the law on vested rights. That failed. We were at that point in time able to protect CEQA because the investors learned that they could live with it. The lending institutions realized that while it took more time because more things were considered by the permitting authority, nevertheless there was a degree of certainty that they thought had not existed, but which did.

LAGE: Did you want to comment on McCarthy's role in the later effort?

ZIEROLD: Following that, some few years later, there were additional pressures on CEQA that came as a result of the Dow issue in the North Bay.

LAGE: I think that was '76.

ZIEROLD: That was '76. The public relations efforts that Dow and others put together were very effective. They were able to persuade a lot of newspaper editorial writers and many people in the legislature that CEQA was a kind of berserk proceduralism. That it was outrageous as a burden on Dow and other companies, and that it was destroying economic growth in the state. No businesses would ever settle in California. No industries would come here because the California Environmental Quality Act made it impossible for them to do practically anything. That, regrettably, taken together with the changing character of the Legislature, meant that now we had much more of a threat to CEQA than the people brought in 1972 and which led to AE 889.

Leo McCarthy, who was as concerned about it as we were, set up a meeting in his office with me, Larry Moss, and Tom Willoughby, chief consultant to the Assembly committee and the one staffer in whom Leo McCarthy had the utmost confidence. We devised a plan to defuse the opposition to CEQA. The first decision that had to be made was to provide more certainty in a shorter time frame for the permit process than was in the original bill. That was basically it. There were other changes made as well, but that was the one which dealt effectively with the charges being made by the Dow PR campaign. But Dow still hangs on.

LAGE: You mean the influence?

ZIEROLD: Yes. The whole Dow issue is something which ought to be the subject of an interview session, or at least part of a session. I think it should be dealt with separately.

LAGE: The Dow issue itself and then its ramifications?

ZIEROLD: Yes. Because it was the campaign waged by Dow against CEQA that led to Leo McCarthy making changes in the act that, as I say, shortened the time frame, gave them better certainty, made some other procedural changes which did away with duplicated comment — the problem of agencies making comment on a matter which was basically outside their jurisdiction and frequently outside their competence.

LAGE: Did the environmental reviews just have to be written, or did they really have to be incorporated into the decision-making on the project?

ZIEROLD: Oh, they had to be dealt with. Under the EIR [Environmental Impact Report] procedure, one files a notice stating that a project is being submitted for approval. And then there is a scoping session where the applicant meets the lead agency, as it's called, which is that agency in government which has the authority to grant the permit.

They require that meetings be held by the firm conducting the EIR and what are called responsible agencies. These are agencies which don't grant the permit but which would have a jurisdictional interest in some of the issues that arise as a result of the proposed project. They, then, over a forty-five-day period discuss what ought to be in the EIR and make comments on the project.

Then the EIR is produced in draft form. It's submitted to the lead agency and distributed to all responsible agencies, given to the Office of Planning and Research, and made available to the public for examination. Then those comments that are submitted in writing by the responsible agencies are dealt with in one way or another, either incorporated directly into the final EIR or discussed and perhaps not adopted if recommendations are made.

That, in a very general way, is how an EIR process works. Then the lead agency makes a decision as to whether or not it will grant the permit. Following that decision there is a thirty-day period during which time the public can review the decision. And a legal challenge can be brought if people don't like the decision made by the lead agency.

That used to take two years or more. A long time to wait, obviously. So charges of obstructionism always arose, charges that this was far too long and too costly. So much money during a period of inflation was required just to keep the project alive.

The interest rates on the money were such that the project became infeasible in some instances, or so they argued. Also, it depends upon how they borrowed the money, too. How the draw down of a loan was scheduled. It's very complicated business, obviously. So it was felt by Leo, quite rightly, that the best way to deal with this was to defuse it and make some concessions, all of which turned out to be sensible ones, and preserve CEQA. which, again, we did.

LAGE: Overall, has CEQA brought a real change, do you think?

ZIEROLD: I think so.

LAGE: Not just paperwork to satisfy the law?

ZIEROLD: No, it's more than just paperwork. Certainly, air quality is the best case in point. How else could we do it other than to require monitoring of air quality over a year's period of time for major projects like power plants or refineries, determining what the best available control technology is and requiring it, making an analysis of what pollutants are emitted by certain industrial installations — NOX [nitric oxide], and SO₂ [sulfur dioxide], and particulates and carbon monoxide, ozone. It is necessary.

Another interesting part of the fight on CEQA was in 1975 right after Brown took office, when Judge Arthur Broaddus in Humboldt County ruled on a lawsuit that CEQA applied to timber harvesting.³

The timber industry went looney over that. They held demonstrations here in Sacramento in January and in February. They brought down logging trucks that rumbled around the Capitol. And they blew their horns and intimidated people in the Brown administration who were new to Sacramento. Claire Dedrick, for example, was secretary for resources. And while Claire isn't the sort of person who's intimidated, it was nevertheless somewhat unsettling to be hanged in effigy, as I believe she was or Brown was, and to be constantly pressured on this. They were a rowdy bunch. No EIR had ever been required of the timber harvest operation.

None ever had. None ever have.

LAGE: How did they get to court?

ZIEROLD: I guess a lawsuit was brought against some timber harvesting plan by a person who didn't want to see it approved.

LAGE: I see, who requested the EIR.

ZIEROLD: Because he or she probably was a landowner adjacent to that particular area where the cutting was to take place. Or maybe he was a little bit downstream of it and was fearful of a lot of sediment getting dumped into the stream, or for some other reason. Who knows why? At any rate, it was a CEQA lawsuit. I suppose this person filed an action for injunctive relief, maybe a temporary restraining order. And Broaddus, as

³ *Natural Resources Defense Council v. Arcata Redwood Co.* (Cal. Super. Ct., Jan. 14, 1975); *N.R.D.C. v. Arcata Nat'l Corp.*, 50 Cal. App. 2d 959 (1976).

I recall, ruled that yes, they were subject to EIRs. Then the timber industry felt that it was necessary to abolish CEQA because to prepare EIRs for cutting plans would be a heavy burden financially. I think that most people agreed with that.

LAGE: They already had to do something of the sort, which we're going to talk about soon, to meet the Forest Practice Act.

ZIEROLD: True, a timber harvesting plan. What happened was the writing and the passage of SB 727 by Senator Nejedly that created a functional equivalent. The functional equivalent of an EIR for forest practices was an addendum to the timber harvesting plan, an expansion of the information ordinarily contained there, prepared in such a way that it could be submitted to the Department of Fish and Game and other departments in the Resources Agency for review and comment and for suggested conditions that might be attached to the permit by the state forester, who had the approval authority. That's ultimately the way it came out. It was a bit of a difficult lobbying job. We worked at it quite extensively.

LAGE: This was something you were supporting?

ZIEROLD: We were in support of that. We thought it a reasonable solution. There were some people who wanted to require programmatic EIRs for the five-to-ten-year cutting periods. That suggestion had been made by Mike McCloskey as part of a model forestry act that he had drafted and was circulating for comment. It wasn't something that he had fully completed at the time, but it was Mike's belief, and I think a correct one, that the real problem lay with the large timber companies and what they wanted to do over extended periods of time. The five- and ten-year cutting plans should be subjected to a more rigorous examination than we'd ever had before. It was argued that we should have EIRs on those and then perhaps have some other approval process for the small operations.

It didn't work out that way. What did work out was the so-called functional equivalent, which was an expansion of the THP [timber harvest plan].

LAGE: And that was supported by the Brown administration, as I recall.

ZIEROLD: Finally.

LAGE: That took some work too?

ZIEROLD: Yes. Actually. Jerry Brown claims credit for the idea of the functional equivalent. But SB 727 really wasn't supported effectively until it had moved some distance out of the Senate. Then it was supported by the Brown administration. You'll maybe get a somewhat different story from the Brown administration if you were ever to ask them, which I don't suppose you will. But I don't think it's an especially important point. The point is that most of the lobbying was done by Larry Moss and by me. In '75 Larry was the deputy secretary of resources. Larry worked on that. The McCarthy CEQA refinements came after Dow.⁴

LAGE: So we will talk more about Dow another time.

ZIEROLD: Because I think that, while it obviously is part of CEQA. I think there is a follow-on feature of Dow, which is to say a kind of turning point in Sacramento. I think the mood changed somewhat as a result of Dow. While it was a CEQA issue, it spilled over into what passed for the environmental consciousness of the Legislature.

LAGE: When we talk about the environmental mood in Sacramento, at some point we should connect that with the mood in general in the state.

ZIEROLD: That's a good idea.

LAGE: Is it reflective of the state?

ZIEROLD: No, it's not. Not now. It was in the early '70s when perhaps the reflection here was a reflection of the environmental movement and not the public at large. There has been an odd reversal. What we were able to do in 1970 through '72 and perhaps on into 1976, to some degree exceeded the real mood. It was like a funhouse mirror in which the image appears larger than the self. Now it's the reverse. They look through the wrong end of the telescope, so to speak. What the Legislature reflects is far, far less than what the general public feels.

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⁴ In 1977, the Dow Chemical Company abandoned plans to build a large chemical complex in the Suisun Marsh area of northern San Francisco bay, citing restrictive environmental regulations and burdensome procedures as the reason.

From the Oral History of

THOMAS J. GRAFF

California Regional Director of the Environmental Defense Fund, 1971–2009

Interviews conducted by Ann Lage in 2009, Regional Oral History Office, The Bancroft Library, UC Berkeley.¹

LAGE: I think we had decided to maybe start with some thought about where you stand in the annals of environmental law?

GRAFF: Okay. Good. Yeah, EDF's motto when I first joined was "Sue the bastards." And particularly in my first — well, really three or four years at EDF, in the early seventies, I complied with the motto.

LAGE: It was sort of what you thought you were expected to do —

GRAFF: Right.

¹ Presented here is a brief excerpt from Thomas J. Graff, "California Regional Director of the Environmental Defense Fund, 1971–2009: Applying Economics to Environmental Policymaking, Reforming California Water Policy," an oral history conducted by Ann Lage in 2009, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2011. © 2011 by The Regents of the University of California.

The oral history excerpts in this "Environmental Law — Oral History" section are intended to provide personal commentaries on the topics discussed in the preceding Environmental Law "Articles" and "Book" sections. This excerpt relates to the article: Peter L. Reich, *What Happened to Hispanic Natural Resources Law in California?*, in this volume, 13 CAL. LEGAL HIST. 43 (2018).

LAGE: — a lot of litigation. Was this a motto that they spoke about openly, or it was just in the background?

GRAFF: No, it was definitely part of the landscape. It was discussed as such.

LAGE: And your training.

GRAFF: To the extent I had training in litigation at all, it was to view issues from a litigator's point of view. But the reality, even in the early days — and certainly later, for me — was that I didn't litigate much, if at all, in the traditional way people do that, which is with depositions and interrogatories and the trappings of modern civil procedure.

LAGE: Even from the beginning, you're saying?

GRAFF: Even from the beginning. I'll give you a couple —. The only real counter-example wasn't litigation at all, but I got involved in early PUC cases, California PUC cases, which are administrative hearings. Although they're sort of formal and they have cross-examination and —

LAGE: And you use your legal skills.

GRAFF: Your skills, right. So I did a couple cases like that. But in the cases I actually filed in court, or I was involved in in court — the *Coastside* case,² which we've discussed; CEQA case;³ the Auburn⁴ and New Melones⁵ cases, which were anti-dam environmental impact statement cases —

LAGE: Sort of traditional at that time.

GRAFF: Right. Well, they were pretty new at that time.

LAGE: But that's what was happening at the time.

GRAFF: Right. And then in a way, the most interesting, the litigation against East Bay MUD [Municipal Utility District]. They were all pretty much litigated on the pleadings.

LAGE: On the what?

² Environmental Defense Council, Inc. v. Coastside County Water District, 27 Cal. App. 3d 695 (1972).

³ Planning & Conservation League v. Department of Water Resources, 17 Cal.4th 26 (1998).

⁴ Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist., 20 Cal.3d 327 (1977).

⁵ Environmental Defense Fund, Inc. v. Armstrong, 352 F. Supp. 50 (N.D. Cal. 1972).

GRAFF: Pleadings. Motions for summary judgment. But not a lot of prep time with witnesses, in advance of the actual appearances in court. I had some distinguished witnesses that I put on the stand at the PUC. In particular, Bill Vickrey, who became a Nobel laureate in economics, testified on time of day pricing. . . .

Back to East Bay MUD. I remembered something that I'd forgotten but I did not know at the time we filed the suit, that was probably the most innovative suit I ever filed, or innovative legal action.

LAGE: Now, tell how it was innovative. We talked about it, but really not in any depth, from a legal point of view.

GRAFF: There're basically two theories for getting at the fundamental tenets of California water law. It's much more complicated than I'm going to make it sound in the next couple of minutes, but basically, California water law is based on prior rights. So if you got there early, you have the water and it's almost an ownership interest. And that potentially causes a lot of problems, because what made sense and was an economic activity in 1880 or in the 1920s, when East Bay MUD really got going, does not necessarily make sense in 2009, or even in 1972.

LAGE: When you filed your suit.

GRAFF: When I filed the suit. But challenging the prior rights system directly and saying it's outmoded is problematic, from a legal point of view. And not just because we have a conservative judiciary, both in California and nationally. There's something to be said for some form of property right in water. Anyway, so there're basically two theories that have evolved over the years to at least chip away at the prior rights, prior appropriations concept. East Bay MUD, by the way, is not directly applicable, because it's a contract with the federal government and we were challenging the contract, basically.

LAGE: You mean their right is based on a contract with the federal government?

GRAFF: Right.

LAGE: But didn't they buy up water rights, a lot of the —

GRAFF: Yes, that was earlier. That was much earlier. But they wanted a supplemental supply.

LAGE: I see.

GRAFF: And our two theories in the lawsuit were, one, that any supplemental supply was a waste of water; that they could reclaim existing water and undertake conservation measures. So that's, in a way, an attack on the prior rights because it meant they had to use their prior rights more efficiently. That was our theory. The second theory was that there was unreasonable diversion of water because they wanted the secondary supply, upstream on the American River, depriving the city and county residents of Sacramento County — as the river flowed down to the Sacramento — of recreational and environmental rights and fisheries interests. . . .

LAGE: Did you think this through on — did you draw on some thinking at the time, as you filed this —

GRAFF: Well, there was a young guy who had just graduated from Boalt, I think — maybe Hastings — named Steve Cavellini. And he and Jerry Meral were involved in kind of designing the suit. Once the suit got going, I brought in one of my quite brilliant law school classmates, by the name of Bruce Dodge, who was in one of the downtown firms in San Francisco. I think Morrison and Foerster. But it was a group effort, basically.

The other innovative piece of the suit, which turned out to be the piece of it that got it noticed, ultimately, by the U.S. Supreme Court, was that it was a tricky combination of federal and state law, because this was a federal contract with the Bureau of Reclamation. And so we debated back and forth for a long time, before filing the suit, two things. One, whether to file in federal court or state court; and two, whether to include the federal government as a defendant. We finally decided to file in state court, in Superior Court in Alameda County, and not to join the feds.

LAGE: And why?

GRAFF: I can't remember all of the thinking, but it was basically that what we were really challenging were issues of state law, not of federal law, and not of contracting and so on, and we were better off without the feds in. And we guessed — and as it turned out, correctly — that for its own reasons, East Bay MUD also would not want the feds in the case. But it was always lurking in the background.

LAGE: So you didn't sue the bureau.

GRAFF: No, just East Bay MUD and its directors, I think.

LAGE: I wonder why the East Bay MUD didn't want the feds in.

GRAFF: Well, I think because — I don't think it was because they didn't think they were reliable allies. Maybe they thought it would slow down the whole contracting and approvals. In order to make this happen, in the old formulation, they would've needed water out of the old Auburn Folsom South project, flowing down the Folsom South Canal. And Auburn Dam was already controversial. There was other litigation, ours included, going on on that. So I don't know the answer. And I think maybe they thought they could get the state courts to throw the case out, on the basis that an indispensable party, namely the federal government, was not a party. And then there's also complex jurisprudence around when the federal government can claim sovereign immunity from prosecution by private parties.

LAGE: Were you concerned that the Alameda County courts would be sympathetic to East Bay MUD?

GRAFF: Well, a perfect question. [Lage laughs] Only many years later, did I learn that the Superior Court judge, who's name was Brunn, behind everybody's back, ours and East Bay MUD's, asked Mike Heyman, who was then a professor at Boalt, for help in the case, because it was a complex —

LAGE: To help him sort it out?

GRAFF: Sort it out. And Heyman assigned, I don't know how many, but some Boalt law students. And they were working in the back rooms, unbeknownst to us.

LAGE: Is this something that happens a lot? So the judge is getting consultants —

GRAFF: It's like a special master, consultants, yeah.

LAGE: But it wasn't upfront.

GRAFF: It wasn't upfront. I don't know how I eventually learned about it, but it was interesting. . . . Anyway, so Mike helped the judge. And the judge wrote a quite erudite opinion on this simple little case.

LAGE: The Superior Court judge.

GRAFF: Right.

LAGE: And in your favor?

GRAFF: No. Well, it depends how you define favor. He ruled against us; but he put in all kinds of stuff that clearly would interest the Court of Appeal, so that they would take the case seriously.

LAGE: Fascinating! And also considering that environmental law was sort of in its infancy, this behind-the-scenes effort of Heyman and his students would, you would think, have some impact on environmental law.

GRAFF: Right, and something similar happened in the *Coastside* case. Again, I think the judge —. And this was surprising to me at the time. I should've known better, but it was in the air. Environmentalism had just come in, was coming into its own. So the judges were interested in it, too.

LAGE: Sure.

GRAFF: Right? So the court of appeal decision in the *Coastside* case also showed a lot of thought. In the last few decades, there's this whole question of, do judges make law or do they interpret law? This was really a set of cases in the early seventies — and not just mine, many others, too — where judges were having to make it up as they went along.

LAGE: Yes, they really had to make it up because it didn't exist.

GRAFF: Right. That's right. David Sive, do you know that name?

LAGE: Yes, I interviewed him.

GRAFF: Oh, you did?

LAGE: Yes.

GRAFF: He did stuff like that in the *Con Ed*⁶ case and . . . then, of course, the *East Bay MUD* litigation, which never had witnesses. Well, it had witnesses in a much later stage, stages.

LAGE: So this early part was not witnesses, it was —

GRAFF: It was all on pleading.

LAGE: — just discussion of the law?

GRAFF: Right, right. Yeah. I think — I moved for summary judgment, so they assumed our facts were valid.

⁶ *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

LAGE: I see.

GRAFF: Which they were. But they —

LAGE: They weren't disputing the facts —

GRAFF: They were all on the record. Right.

LAGE: — they were disputing the law. . . . And then, of course, the litigation went on for a long time after Judge Brunn's ruling. It went to the Court of Appeal. . . . And did you carry it on in the Court of Appeal?

GRAFF: Well, Bruce Dodge and I did the appeal brief together. And just as an aside, I think I mentioned in one of the early interviews that a cataclysmic moment in my life was when I got my grades from first year law school. I was sixth in my class; Bruce Dodge was fifth.

LAGE: Oh! [they laugh]

GRAFF: Anyway, he's an interesting guy. We got sidetracked off the legal theories. Waste of water, unreasonable diversion, and unreasonable use were all kind of untested theories, in terms of kind of the actual practice of a utility or of a water agency. The other big strand of law that attacked the prior rights doctrine, in some sense, was the public trust. And of course —

LAGE: And was that at that time —

GRAFF: That was brewing at that time. And the most notable advocate of the public trust, from a legal point of view, was Joe Sax; whereas Charlie Meyers, who I mentioned earlier, was the most active proponent of using water markets as a different way of loosening prior rights. Basically, allowing sale —

LAGE: But it's not really — is that a legal theory, or just a kind of a practical accommodation to prior —

GRAFF: Well, that's an interesting question again, because one of the unanswered questions — here we are thirty-five years, thirty-seven years after the National Water Commission report, on which both Sax and Meyers were staff. How much of the resistance to water markets over the years has been based on a set of legal theories, and how much has just been good old boys, or "that's the way we've always done it, that's the way we're going to keep doing it" kind of thinking.

LAGE: But would the resistance be coming from the public trust people? The public trust proponents?

GRAFF: Well, we have critics — I'll use the old terminology — on our left who are big public trust advocates, who don't —

LAGE: And they'd rather attack the doctrine of prior appropriation?

GRAFF: Yes, attack it head on and say, "That old use is no good anymore and it ought to be something else." And there is some precedent in California water law. The most famous case is *Joslin v. Marin Municipal Water District*.⁷ . . . The issue there was a gravel mining operation on a stream where the growing areas of Marin wanted to use the water for municipal use. And to the surprise, I think, of many, the California Supreme Court said, if it's a higher use, the old gravel operation has to give way. So there is some —

LAGE: That's quite a precedent.

GRAFF: Right. But here it is forty years or more later, forty-five years, and that and the *Mono Lake* case⁸ — which, by the way, Bruce Dodge also was a key litigator in — have chipped away at the prior rights doctrine. And in that article I wrote in 1981, I kind of allude to the shakiness of the Imperial Irrigation District's prior rights, which also are complicated because it isn't clear that it's the district's right or the farmers' right. And it's a federal project and — But the Imperial Valley was there before the Colorado River Compact and the Hoover Dam. So none of these water law questions are easy. So these are to some extent competing, and to some extent complementary theories for direct legal challenge or indirect legal challenge of the prior rights system. But we're 130, 140 years into the prior rights system.

LAGE: It's hard to overthrow it.

GRAFF: Right.

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⁷ 67 Cal.2d 132 (1967).

⁸ Nat'l Audubon Soc'y v. Superior Court, 33 Cal.3d 419 (1983).

From the Oral History of

HENRY J. VAUX, SR.

*Dean of the UC Berkeley School of Forestry,
1955–65; two-term chairman of the California
Board of Forestry, 1973–83*

An interview conducted by Ann Lage, 1984–1986, Regional Oral History Office, The Bancroft Library, UC Berkeley.¹

VAUX: [I]n January 1975, two things happened. The new governor, Jerry Brown, came in with Claire Dedrick as his resources secretary. Almost simultaneously, a court in San Francisco handed down an opinion in the case of *Natural Resources Defense Council v. Arcata Redwood*.² This opinion held that forest practices regulation was subject to the constraints of the California Environmental Quality Act. . . .

¹ Presented here is a brief excerpt from Henry J. Vaux, “Forestry in the Public Interest: Education, Economics, State Policy, 1933–1983,” an oral history conducted in 1984–1986 by Ann Lage, Regional Oral History Office, The Bancroft Library, University of California at Berkeley, 1987. © 1987 by The Regents of the University of California.

The oral history excerpts in this “Environmental Law — Oral History” section are intended to provide personal commentaries on the topics discussed in the preceding Environmental Law “Articles” and “Book” sections. This excerpt relates to the article: Darren F. Speece. *From Corporatism to Citizen Oversight: The Legal Fight Over the California Redwoods, 1969–1999*, in this volume, 13 CAL. LEGAL HIST. 57 (2018).

² *Natural Resources Defense Council v. Arcata Redwood Co.* (Cal. Super. Ct., Jan. 14, 1975); *N.R.D.C. v. Arcata Nat’l Corp.*, 50 Cal. App. 2d 959 (1976).

The California Environmental Quality Act had been passed in 1969, so it was on the books and we knew it was there. But all that the California Environmental Quality Act does is establish procedures and require that certain problems be addressed; it doesn't make any action mandatory other than procedures.

LAGE: Procedures for environmental review.

VAUX: Yes. I know my intuitive conception was that the Forest Practice Act actually told people what they may and may not do. That's so far beyond the procedural thing that intuitively I felt there should not be any conflicts. So it blew my mind when the court found that on legal ground the California Environmental Quality Act did apply to timber harvest operations.

That threw everything into total chaos because the permitting system and the rules that had been implemented by the board . . . had not paid any attention to the constraints of the California Environmental Quality Act. Those rules had been drawn by a board entirely appointed by Governor Reagan, so that there wasn't very much environmental sympathy on that board, or in the district technical committees. So the whole system had not been very environmentally oriented. . . .

So in January '75 at the same time the new governor came in this lawsuit was handed down requiring that the terms of the California Environmental Act had to be recognized in relation to forest practice regulation. That meant that every timber harvest plan issued in 1974 as good for three years was held to be illegal.

That immediately created a furor and led to the march on Sacramento where the loggers all drove down and milled around the Capitol with their logging trucks and so on. Two or three days after the Brown administration had taken office poor old Claire Dedrick was hung in effigy.

LAGE: But she simply had nothing to do with that ruling.

VAUX: That's right, but the solution was up to her. I mean, that's the way political things go often. It is not the person responsible for posing the problem who has to bear the brunt of solving it. Claire sorted that all out in terms of something called functional equivalency. The California Environmental Quality Act had provided that the resources secretary could certify certain processes other than the normal CEQA-EIR stuff as functionally equivalent. If so, then those alternative processes would have the force of law.

Claire decided that the approach to use was to arrive at a position where the timber harvest planning process and the forest practice rules could be certified by her as functionally equivalent to the environmental impact process. . . .

I guess that's enough about the atmosphere at the time of my appointment [as chairman of the Board of Forestry by Governor Jerry Brown in 1976]. . . .

[My predecessor] Howard Nakae asked me to lunch one day and passed on words of advice as to how one ought to run the Board of Forestry. One piece of advice that he gave me was, "Just keep Redwood Creek off the agenda, and you'll be all right." I didn't know enough at that time to realize that that was rather futile counsel.

At any rate, I first sat on the board on June 24, 1976, and the next meeting of the board was on July 22. That meeting was held at Chester by a previous decision. It turned out that the agenda at that meeting had to be given over to a discussion of Redwood Creek anew. That was a very wearing experience for me because I had never presided over anything like it. It was billed as a discussion, but essentially it was a loose public hearing with all the interested parties able to address the board on the subject. It was designed to be an effort to let people air their views and let off a little steam, and perhaps something useful might come of it.

There were a very limited number of things that the board could do in relation to Redwood Creek. Obviously, the administration and other people were under a lot of pressure. It was the kind of situation where one of the things is to let the safety valve pop off and at least let people talk someplace where they feel they're talking to somebody who is in a position to at least listen to them and maybe react to them, rather than just beating their drums in the newspapers.

LAGE: Maybe we should set the scene a little bit or maybe you're about to do that. Tell what was happening with Redwood Creek.

VAUX: I was going to try to do that, yes. The Redwood National Park was originally set up in 1968. Whether by deliberate design or not — I can't escape the feeling that it was deliberate design on some people's part — it was a design for disaster. Because the original redwood park consisted, so far as the federal land is concerned, of a relatively small acreage of twenty

thousand acres or so of largely virgin timber at the lower end of Redwood Creek around the town of Orick.

Then, south of that area, a strip was included in the park that was a quarter of a mile on each side of the bed of Redwood Creek, running from this Orick area on upstream to the so-called “World’s Tallest Tree.” This strip is about seven miles long. It became familiarly known as “the worm,” because that’s what it looked like on a map, kind of a wriggly thing that followed the stream bed up.

That land was put into federal park ownership, but the hillsides above that on either side remained in the ownership of the timber companies. The original park act gave the secretary of the interior authority to make agreements with the timber companies on measures needed to log those areas in ways that would protect the park, but the secretary of the interior never entered into any such agreements. Without knowing much about the inside of it, my view of that was that it was because the federal government was too tight to do it, or else it was deliberately too tight in order to try to force a crunch that would lead to different action.

LAGE: To more park area?

VAUX: Yes. I should point out that the redwood park consists of other areas besides this. There’s another area up around the Jed Smith State Park. When I talk about the redwood park, I’m talking primarily about the Redwood Creek part of the redwood park. As you know, the Redwood National Park is built around parts of two or three state parks, and the two or three state parks really include the gems, if you’re interested in cathedral-like redwoods. There are some very nice old growth redwoods in the federally-owned park, but I don’t think there’s any doubt that they aren’t quite as magnificent as the ones that are in the state parks.

So I had never had any particular enthusiasm for the whole idea of a Redwood Creek national park. The upper end of Redwood Creek had been despoiled long before; the upper end of Redwood Creek is not redwoods, it’s Douglas fir. That area had been logged in the fifties with very much less care than was being exercised in the seventies. As a result of that, and as a result of highway construction and some actual subdivision up in the northern reaches of Redwood Creek, there was just a desperate situation where the whole country was falling down into Redwood Creek.

All that stuff over time, the debris that arrived at the bottom of the slopes, was being pushed down by each storm, and is still being pushed down, and is going to go right through the national park. That just seems to be not a very wise location.

LAGE: So you think the actual choice of including Redwood Creek in the national park was a mistake?

VAUX: When I contemplate what could have been done for national parks as alternatives by the expenditure of the same amount of money, I think it's a real tragedy. As you probably know, hundreds and hundreds of millions of dollars have been spent on the Redwood National Park. A hundred years from now, I'm sure it'll be a magnificent, beautiful area, and probably people will receive proper tribute for it. But in the meantime, it seems to me it's a kind of a disaster area.

Remember that, I don't know what the figures are, but if you look at the attendance at the Redwood National Park and follow where those people go, I think you'd find that a considerable number of people will go up and see the Lady Bird Johnson Grove, but most of the people are going to go, and are going, as they did before the Redwood National Park was ever dreamed up, to Prairie Creek, to Jed Smith, and to the Del Norte Coast parks. All of those were state parks long before the Redwood National Park was bought. There isn't any doubt that the creation of the national park gave a modest stimulus to visitation in the area, and that's been of some significance to the regional economy. But in the very nature of the case, since the recreation business is highly seasonal, and particularly in redwood park, where it's not a resident recreational use, it's a kind of a transient I mean people don't go and stay there and hike the way they do in Yosemite.

LAGE: They drive through.

VAUX: It's a drive-through kind of thing. The impetus to the local economy has been modest, I would say, and far, far less than the proponents of the park were suggesting it would be. So, I have felt if somebody could have persuaded the whole redwood park issue to go away about 1966, it would have been a fortunate thing for all concerned.

I think as time goes on, its major importance may have been not the physical park itself, and again I'm talking about the part in federal ownership, but the political symbolisms that the redwood park controversy

brought out. Those I think had lasting effects. In other words, the redwood park issue energized a whole lot of political action that was just waiting to be energized and had effects that had nothing to do with the question of whether redwood park was a good idea or not a good idea and the question of where it should be put.

There was one other point I wanted to make as part of this background. Part of the background here is, “What was the Board of Forestry doing involved in this anyway?” because the Board of Forestry had absolutely no authority one way or another to determine whether there would be a park or would not be a park, and if there was going to be a park, where it would be.

The Board of Forestry probably could have made a policy statement either favoring or disfavoring a park, which would have had totally no effect, because the board had no political constituency of its own. And in the face of the uproar that was going on between the industry and the environmentalists and the Sierra Club and the North Coast Ecology Center, and all the little rump groups that emerged over that thing, whatever the board had said wouldn’t have been listened to.

The reason the board was in it was because there were mechanisms which meant that all the various partisans, regardless of what their point of view, could use the board to get publicity for their point of view. The reason the board could be used was that timber harvest plans had to be approved by the state, and the companies who owned the land outside the park in Redwood Creek were engaged in logging timber on those slopes above the park, and that logging created a very incendiary atmosphere because its appearance is very destructive. So it became natural for the process of approval of those timber harvest plans to come under very close scrutiny.

The Nakae board had been asked to declare a moratorium on timber harvest plans in the Redwood Creek area until such time as the park issue was settled. The Nakae board had refused to do that, and I think properly, because I don’t think the Board of Forestry had any statutory authority to declare a moratorium on timber harvest plans. I mean, it’s one thing to have regulatory authority, and it’s another thing to just arbitrarily declare a complete suspension of timber cutting because somebody wants to think about a park in an area. . . .

So this discussion at Chester was essentially an airing of various aspects of public opinion. It focused, because of the nature of the testimony,

on two issues that the pro-park people had picked up and were very concerned about. They were trying to get the board to recognize the importance of two things: one, so-called cumulative effects, and another, the importance of long-range planning.

The cumulative effects issue is difficult to deal with because there never has been full clarification of what cumulative effects are, in a rigorous sense. But the basic notion of it is that if you clearcut ten acres in a watershed, the effect is probably fairly minor. If you clearcut two thousand acres in the same watershed within an equally short period of time, then the effects become —

LAGE: Cumulative. [laughs]

VAUX: [laughs] It's a tricky term, though, because it's argued by some that this is simply a multiplicative effect, not cumulative. Behind the notion of cumulative effects, as it's emphasized by the people who believe in this line of approach, there's some synergism involved, so it isn't just a multiplicative relationship; the effects are much more powerful, not in a multiplicative sense as you increase the area, but in some kind of exponential sense. In certain kinds of effects there may be some validity to that, I think.

LAGE: Is this something that's argued among foresters? Are we talking about differences in points of view among foresters?

VAUX: The cumulative effects argument has been made most strongly by the environmentalists. Some foresters shared their view, others didn't. They have criticized the forest practice rules repeatedly for failure to deal with cumulative effects.

In May of 1977, we came back to Redwood Creek. There's quite a lot to say about that.

LAGE: I assume not too much was happening with the redwood issue after the Chester hearing.

VAUX: Well, a lot was happening in the redwood issue, but not at the Board of Forestry. As I said, the board really had no concern with Redwood Creek, except through timber harvest planning. Following the Chester hearing, while there was grumbling and discussion going on, nothing happened in the timber harvest planning aspect of Redwood Creek to bring it to the attention of the board.

There was a lot happening at the congressional level, which was where the action was and should have been: in the sense that bills were introduced, and those were going through hearing, and that sort of thing.

LAGE: Did timber harvest plans come before the board during that period?

VAUX: No, because the director approved timber harvest plans during that period, and this was a continual source of irritation to the pro-park expansion people. But so long as the director [of the Department of Forestry] was approving plans, there was no occasion for the board to look into the situation. . . .

All during the summer and fall of 1976, and earlier even, the Resources Agency, the Division of Forestry (as it was then), the Park Service, the landowners, with all kinds of lawyers including the state Attorney General's Office, and the U.S. Attorney General's office, and the Natural Resources Defense Council looking over their shoulder every step of the way, had been involved in trying to develop special procedures for the review of timber harvest plans in Redwood Creek. Actually, many of these procedures were used informally in review of Redwood Creek timber harvest plans but many environmentalists wanted rules requiring these procedures.

Those timber harvest plans were probably more closely scrutinized than any other timber harvest plans that have ever been written. I think there was more danger to environmental values from people stomping over the ground in the course of determining whether the plans could be approved or not — that's an exaggeration — but it illustrates the point, that the intensiveness of the discussion and information exchange was unprecedented. All that was going on and was kind of the holding action that was being mounted, and so the processing of plans was extremely slow and not very many of them came along.

Until the spring of 1977, the director had, in fact, approved all the plans that had made their way through that maze of special procedures that had been developed.

LAGE: Was Lew Moran still the director?

VAUX: Yes. Review teams had been developed as a device for meeting the requirements of CEQA. Even though there was no statutory requirement for them, they were used in fact in those Redwood Creek plans. It wasn't until April or March — I'm not sure about the precise dates but along in

that period — with legislation at the federal level to establish the park now at the committee hearing level — not just introduced, but at the level of committee hearings that Lew Moran denied the first Redwood Creek plans.

There were three of them, two Louisiana Pacific plans, and one Arcata Redwood plan, which were denied at about the same time. The companies, in line with their rights under the law, appealed those denials to the board. So everything was set up for a hearing on May 12 or 13, 1977, I've forgotten which, on appeal of the denial of the Redwood Creek plans. That was quite an affair.

Now, there was some preliminary action. We had seen the question coming down the road, we knew the plans had been denied, we knew they'd be appealed. In expectation of that, I had written a letter to the attorney general, Mr. [Evelle] Younger, asking him two or three specific questions that had to do with the board's authority to deny these plans. The questions were thought out rather carefully, and were quite specific as to what the limits on the board's authority might be.

LAGE: Were the questions regarding how you should consider the pending legislation?

VAUX: No, it had nothing to do with the legislation; they had to do with the board's authority and the director's authority to deny timber harvest plans, and what kinds of considerations could be taken into account in arriving at that determination. If you want to have access to the letter, I can dig it up from somewhere, I'm sure it's around. But I'm sure that also it's a matter of record in the Attorney General's Office and the Board of Forestry office, and elsewhere. . . .

Now, this hearing was a very long and wearing process. It ran from about a quarter of nine in the morning until ten-thirty that night, so everybody was just ragged by the time it was over.

LAGE: Was this Sacramento?

VAUX: In Sacramento, yes. And there was quite a crowd there; we had to get a special room to provide room for everybody to be there. I was concerned because we'd had a couple of appeal hearings before, so I'd had a chance to get a little bit familiar with the appropriate procedures for these hearings. The more familiar I got with them, the more confusing they seemed to me to be.

We had a vary good man from the Attorney General's Office to guide us in these matters, Mr. Robert Connett, and he'd had a long experience with the board. But he had a way that many good lawyers have when you ask what you thought was a straight question, and you get back something that is very, very hard to understand as an answer to the question, sometimes. That's not a criticism of him, it's a question, as I understand it, that a lot of times the law isn't clear, and an attorney isn't going to stick his neck out and say, "Yes, this is it," when the law doesn't say so.

There was a lot of this in hearing cases, in that the statute just wasn't very clear on who did what to whom in the course of a hearing. The one thing that Connett made perfectly clear was that the law gave the chairman a lot of discretion as to how the hearing should be run. That placed me under some pressure to try to run it in a way that would not be subject to too much challenge subsequently.

So this matter of the procedures was lurking in the background all the time, to be sure that everybody was given due opportunity to have their say, but nobody was given an opportunity to say too much [chuckling].

LAGE: Or you would have been there two days from 8:45 a.m.

VAUX: The question of the time duration really wasn't germane, no. The question was that now this was a legal proceeding. We knew that whatever the board found, it was going to be contested in a higher court. So unless the proceedings were justifiable in terms of the statute that outlined those proceedings, that would be the first ground on which somebody would throw out whatever decision the board had made.

Everybody, on both sides, I think, was anxious that proper procedures were followed. You never want to have stuff thrown out on procedural grounds if you're trying to defend the position of the board because that just means you haven't done your homework properly, or you've committed a procedural boner which doesn't reflect well on the board at all, regardless of what substantive answer you came out with on the issue of redwood park.

LAGE: You had several attorneys on the board, as well. Did having attorneys on the board present any special —

VAUX: We had two attorneys on the board, and we had another attorney serving the board, a representative of the Attorney General's Office.

In general, Mr. Berry and Mr. Pesonen, I thought, showed quite a bit of restraint in that they didn't attempt to practice law as well as being on the board. I mean, they brought legal backgrounds, which, in the main, I think, were helpful.

Occasionally, it got difficult to follow some of the discussions about legal matters between those people and the attorney general, but I was never aware that they were trying to second guess the attorney general, who was our legal counsel. Pesonen and Berry were always careful, I think, to observe and to stress that they were not the board's legal counsel. In many cases, in drafting findings and things of that sort, which have to go along as part of the legal process, they were very helpful because of their legal knowledge.

Now, I mentioned the letter I had written to Attorney General Younger. As I went to the hearing at eight o'clock that morning, I still hadn't received a response to my inquiry. I got to the hearing room, and shortly after I arrived and just before I was going to convene the hearing, a representative of the Attorney General's Office handed me the attorney general's response.

I quickly read it, and fortunately I was enough awake to realize that in some subtle way the attorney general had changed the question. While the thrust of his opinion, as I read it, was that the board didn't have the authority to deny these plans, the question that the attorney general responded to, and which he put into the letter, was a different one from the one I had asked.

That's not an uncommon thing; lawyers will often rephrase questions that are asked of them. But nevertheless, the question, for whatever reason, had been modified slightly. And because of that. I thought that the answer really wasn't responsive to the question I had asked. . . .

The attorney general's letter in effect said the board didn't have the authority to do this, regardless of —

LAGE: To deny —

VAUX: To deny the plan. But he said that in the context of answering a question that I thought was different from the one I'd asked him.

LAGE: Was he also saying that the director didn't have the authority to deny the plan?

VAUX: Yes, sure, because the board hearing was supposed to be on the basis that the director had used to deny the plan.

The next interesting thing to emerge was that the legal justification that the appellant companies then presented to the board as their case for why the board should overrule the director was couched almost entirely in the language of the attorney general's opinion. I have no evidence one way or another, but I just couldn't escape the feeling that perhaps the attorneys for the companies might have seen a draft of the attorney general's letter before I saw it. And there'll be some follow-on to this subsequently.

The other interesting, highly entertaining aspect of the hearing was that the existence of the letter let me back off a moment. The unusual nature of this hearing process is indicated by the fact that the Attorney General's Office provides the attorney for the director, who is one party to the case opposite the companies, and the Attorney General's Office provides the legal counsel to the board that's sitting in the role of the judge. They are two different [assistant] attorney generals, but they come out of the same office and so presumably are guided by the same policy viewpoint.

In addition, in light of the attorney general's letter to me, the [assistant] attorney general presenting Lew Moran's case, as director, was precluded from giving him any legal defense whatsoever. The attorney general's letter already implied what the director had done was illegal.

LAGE: That's very interesting.

VAUX: So what happened was a fascinating thing. Usually in appeal hearings, the director will argue the forestry and substantive-fact aspects of the case, and the procedures that he followed, and the attorney general's deputy will provide the legal justification. Instead of that they turned it around, and the attorney general's representative gave the forestry and administrative aspect of it, and Lew Moran gave the legal defense. [laughter] Which is kind of an interesting way to handle the problem. It's too bad somebody didn't get Lew Moran's reaction to having to be his own lawyer on that occasion.

Those are just some of the backgrounds that some historian might be interested in someday, on that case.

LAGE: Did that letter from the attorney general affect how you went ahead and proceeded?

VAUX: I distributed copies of it to all members of the board, of course. For my own part, I decided to ignore it. Now, it obviously affected how the attorneys for the companies proceeded because they relied heavily on that.

LAGE: Was it then also a matter of public record? Were they referring to the letter to you at all, except for the fact that their arguments were couched in those terms?

VAUX: As soon as the letter was delivered to me, it became a matter of public record, so they had access to it at that point. The only thing that to me seemed a little bit extraordinary was that I still hadn't had time to read and digest the letter myself when they presented their case in terms that alluded to arguments and language used in the attorney general's letter. I couldn't exactly visualize them getting it in there in such depth within the time constraints that had limited me.

The upshot of it all was that it came to a vote, and the vote I think was much less close than most people expected. It was, in fact, on two of the plans a six-to-three vote, and on one of the plans a five-to-four vote to deny the plans. I was the one person who did not vote the same on all three of the plans, and I don't think anybody ever understood why that was. I think they probably thought I was confused, or else was trying to waffle in some strange way, and that wasn't the way I saw it at all.

But as I saw the gist of the case, it goes back to this intent language that we've talked about earlier today, where the board has to give due consideration to recreational values in comparison to timber values. Well, the timber values were clear, and there has been a lot of testimony on that. The recreational values, as I saw it, were potential, and they were potential in two senses.

One, what is the value of a national park in being? That's a very difficult thing to estimate in some sense, to say nothing of an addition to a national park. The other thing was, what was the potential that Congress was going to act to create an addition to the national park? At that time we didn't know that. We had a barrage of telegrams and letters from interested congressmen and senators who were supporting the park addition, but that was no guarantee that a park bill was going to come out.

So I felt what one had to balance, in terms of the Forest Practice Act and its intent language, was the potential recreational value added by the

park addition against the value loss of the timber, both looked at in a broad societal context. The difference in my vote was simply a reflection of a subjective assessment that two of these plans were in the area that Congress was very likely to include in the park, and the other one was considerably more remote and seemed to me was outside any area that Congress was likely to include in an expansion. So, in a specific evaluation comparison, the three plans were not identical. . . .

LAGE: Do you think that the decision that was made reflected a change in the board's point of view, the board's composition? Or a change in what was happening with Congress? Or was it not related to either one?

VAUX: I think it was related to all these things. The argument that "the board ought to do something" was greatly strengthened by the fact that the bills in Congress had progressed to the hearing stage, and had already in the case of one house, I think had a favorable subcommittee report on one or more of the bills. The process was moving ahead politically, and so the probability that the park would be enlarged in some way was much greater than it had been earlier on. . . .

Of course, once the board had denied those plans, and in effect, confirmed Lew Moran's decision to deny them, then the companies immediately took the board to court. The trial of that action was conducted in the superior court in Eureka.

There were two or three interesting sidelights on that. The trial itself, of course, is a matter of record. But all of the Humboldt County Superior Court judges disqualified themselves from hearing the case. So a judge from over in one of the valley counties, I've forgotten which one, Colusa County perhaps, came over and heard the case. We thought initially that he probably was not sympathetic to the legal grounds, but it turned out differently.

There were two other background matters that it may be of interest to mention. For the same reason that the attorney general couldn't carry the director's legal defense in the timber harvest plan appeal, the attorney general had to disqualify himself from defending the board in this legal suit. The governor authorized us to employ private counsel, and to provide the funds necessary to pay that counsel, which were very substantial.

We employed a firm in San Francisco, Lillick, McHose, and Charles which was a firm, as I recall it, primarily noted for its expertise in admiralty law and therefore in administrative law, and this was an administrative law matter. One of the problems that we had in acquiring counsel was that many of the leading San Francisco firms already had ties to the timber industry, and they begged off and properly would have disqualified themselves from representing the board because of their having important timber companies as their clients already.

We dealt with Lillick, McHose, and Charles, and Mr. Pesonen and Mr. Berry were very helpful in working with those attorneys and keeping me properly guided in dealing with the board's relationship with those attorneys. I went up to Eureka to attend the trial proceeding, not that there was anything at all for me to do there, but I thought somebody should go and show the flag and display the board's interest in the proceedings. . . .

As is now a matter of record, the trial went very well, and the judge's opinion sustained the board on all the charges that were raised. The Superior Court's finding came out in mid-summer; I can remember receiving the telegram in Scotland. By the time that came out, then there was a six-month period when appeal from that hearing could be taken. But by that time, the park bill had passed Congress and so any further appeal was moot. So that's where that thing stands legally. It was never really firmly resolved that the board was right, but it does have a Superior Court opinion in support of its position.³

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³ Arcata Redwood Co. v. State Bd. of Forestry, No. 61910 (Cal. Super. Ct., Sept. 8, 1977).

From the Oral History of

DAVID E. PESONEN

Attorney and Activist for the Environment, 1962–1992

Interviews conducted by Ann Lage in 1991 and 1992, Regional Oral History Office, The Bancroft Library, UC Berkeley.¹

LAGE: We want to get into your career in forestry, the California State Board of Forestry and the Department of Forestry. Let's start with the state board. No, let's start before the state board. Had you been involved in any forestry issues before you were appointed to the board?

PESONEN: Not very much. I was involved with the state Board of Forestry back in the early sixties when I worked for [Executive Director David R.] Dave Brower at the Sierra Club. That was part of my unshaped responsibility

¹ Presented here is a brief excerpt from David E. Pesonen, "Attorney and Activist for the Environment, 1962–1992: Opposing Nuclear Power at Bodega Bay and Point Arena, Managing California Forests and East Bay Regional Parks," an oral history conducted in 1991 and 1992 by Ann Lage, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1996. © 1996 by The Regents of the University of California.

The oral history excerpts in this "Environmental Law — Oral History" section are intended to provide personal commentaries on the topics discussed in the preceding Environmental Law "Articles" and "Book" sections. This excerpt relates to the article: Darren F. Speece. *From Corporatism to Citizen Oversight: The Legal Fight Over the California Redwoods, 1969–1999*, in this volume, 13 CAL. LEGAL HIST. 57 (2018).

that he gave me. My title was conservation editor, but I did all kinds of things, and one part of the job was to represent the club before the state Board of Forestry in the very early years, in my early years, anyway. And then after I went into law practice in 1969 I kind of kept an eye on it. I was asked by Henry Vaux to serve on a study committee of the American Association for the Advancement of Science [AAAS] on forest practices. That was probably around 1975 and we did a little report for AAAS. . . .

LAGE: How did the appointment come about to the state board?

PESONEN: Well, Hank Vaux was chairman by then, and I guess he consulted with [Secretary for Resources] Huey [Johnson]. There was an opening for a public member who would be acceptable to the environmental community. They knew who I was and whether Vaux planted the idea with Huey or whether Huey came up with it himself I don't know.

LAGE: Did you know Huey?

PESONEN: I knew Huey from his Trust for Public Land days. I just got offered the position. It was part time, and it sounded like something interesting. There were a lot of forestry issues involving the Redwood National Park that were in the press a lot. . . .

LAGE: Well, when you came on the board, your first meeting was highly focused on the redwood park issue [May 1977]. Do you remember much about that?

PESONEN: Well, the redwood park was the forestry environmental issue at that time. Congress had passed the Redwood [National] Park bill in 1968 but it was not an adequate park. The park covered Redwood Creek, but it only covered the narrow strip up the creek called the worm. On a map it just looked like a worm meandering up the creek. The surrounding watershed was vulnerable to continued logging. It was just plain that that park wouldn't amount to anything if the entire watershed didn't have some protection, whether incorporation in the park or limitations on logging different from the regular forest practice rules, which was under consideration by the Board of Forestry when I first got there.

And there was a bill in Congress to extend the park substantially. [Senator Alan] Al Cranston — I think it was Cranston — and [Representative Phillip] Phil Burton were carrying that bill. There was a lot of interest in it,

but it hadn't passed yet. In the meantime, Louisiana Pacific and Simpson [lumber companies] — I think those were the two principal companies, maybe Georgia-Pacific, too — had filed with the department very large timber harvest plans to log in that watershed. It was very clear that their strategy was to get as much timber out of there as they could before we got it condemned by the federal government for addition to the park. So the problem was to figure out a legally sound theory for holding up those timber harvest plans until Congress could act on the expansion of the park and fund it. It wasn't very clear in the law how we could do that.

LAGE: You had to go by the prescribed forest practice law?

PESONEN: Well, it wasn't very clear how the board had authority to deny a plan. I think the director [of the Department of Forestry] had denied the plans, the companies had appealed to the board — because you only considered these issues on appeals from the decisions of the director, as I understand it? Yes. The question was whether we could deny the companies' timber harvest plans. I think [Board of Forestry member Phillip S.] Phil Berry and I spun out a theory that was not complete hokum to deny the plans for some interim period because there had been actual action by Congress. The bill had passed one house; it just hadn't passed the other house, and that was enough, we thought, to fit into certain language in the rules that gave the board authority.

That was a big hearing; there were a lot of people there. . . . It gave me an opportunity to explain what we were doing, explain the limitations on what our power was. And I took that seriously. . . . But it was very clear that the administration and a majority of the board wanted to protect that watershed because we were quite sure that Congress was going to pass the measure pretty quickly and fund it. You know, you got the usual arguments from the industry that tens of thousands of jobs would be lost forever. You hear that all of the time from the industry. You are still hearing it. You still hear it in the ancient forests controversy. I think their economics is shaky, but even if they are not shaky, the jobs are temporary and the park is permanent. I was an acknowledged environmentalist, and I was put on the board with that in mind. I was a public member; I wouldn't say I had a constituency, but I certainly had a sympathy for what the Sierra Club and Save The Redwoods League and other people

wanted to do. So if, legally, we could do what we wanted to do, we would. If we couldn't do it legally, we wouldn't.

LAGE: You said there were a lot of people at the hearing, both sides? Were they on both sides?

PESONEN: It was a big hearing.

LAGE: Was it pretty intense?

PESONEN: It was lively. It wasn't angry.

LAGE: Somehow, I would envision a lot of anger at that point.

PESONEN: I don't remember it as being an angry meeting.

LAGE: How about on other issues among the board members? Was the cooperation among the board members good? It seems like there was a balance of people.

PESONEN: Well, it was, by the time I got on the board, dominated by Jerry Brown appointees, and I think the cooperation on the board was very good. I attribute that to Hank Vaux's style. Hank Vaux was a wonderful chairman, and he had a great skill at finding consensus among board members. He had a good, crafty sense of pace of how things were to be done, and of process. And he is a wise, thoughtful person and a very good leader. He was hard working, and I respected his abilities. I didn't always agree with him, but I never felt that he was unfair.

LAGE: He devoted a great deal of time to that, it seems.

PESONEN: Oh, he devoted an enormous amount of time to it. It was almost a full-time job for him.

LAGE: I interviewed him on the Board of Forestry so we talked about it quite a bit. He seemed very process-oriented, to be sure that process was just correct so it wouldn't be challenged later in courts and — was that something you discussed with him?

PESONEN: That's the way a lawyer thinks, too. But it's also the way a very skilled administrator thinks, and Hank was a skilled administrator. It's also the fairest way to do things. Process is an established set of agreements among people about how things ought to be done to assure that when the

result is reached, that everybody who has participated in it feels that the result was fairly reached even if they don't agree with the result. . . .

LAGE: Let's leave the board and go to the department. Now how did that appointment come about? Are you aware of how your name came up?

PESONEN: I don't know how that came about. I know that I had been thought of as director sometime earlier when Claire Dedrick was secretary for resources before Huey. Moran was thinking of retiring, or maybe Dedrick was thinking of replacing Moran. This was probably two years earlier. I think it was right about the time I got on the board. It might even have been before I got on the board.

LAGE: Were you aware of it at the time, that you were being considered?

PESONEN: Well, she called me up one day. I knew her. She had been with the Sierra Club Loma Prieta Chapter, and I had known her from the anti-nuclear days. . . .

LAGE: You mentioned — maybe it was in your résumé — that one of the things you did was getting industry acceptance of the Z'Berg-Nejedly Act.

PESONEN: Yes, I worked hard to — I should have said that earlier. One of my agendas was to reduce the level of adversarial feeling towards the Z'Berg-Nejedly Act, and I think I had some success at that. It was never complete.

LAGE: Where did the adversarial relationships come in?

PESONEN: If a timber harvest plan which had some opposition to it still met the law, I approved it. I was very careful to know that the industry knew that I was going to follow the law and I didn't have an environmentalist agenda. I was happy to see the law changed, and I would work to change the law, but if I couldn't change it, I was going to follow it. I also spent a lot of time, like anybody would, like a lobbyist, in effect. There was an open-door policy. The timber industry representatives could go in and make their pitch anytime they wanted, and I didn't treat them like enemies.

LAGE: Was that a difficult transition for you? I mean you kind of came from being seen as an activist, whether you saw yourself that way or not, to becoming an administrator.

PESONEN: That was not hard for me at all. . . .

LAGE: You didn't feel that you were expected to behave in a certain way by the environmental community?

PESONEN: Well, my reputation was pretty solid, number one. Number two, in those days the Department of Forestry was not the focus of a lot of the environmental controversies. The Z'Berg-Nejedly Act wasn't very old. We were still maturing. And I was determined to see that that process continued. Where there was going to be some serious resource damage and the timber harvest plan had a flaw in it, I'd turn it down.

LAGE: Did you feel like you made progress getting the timber industries to buy into it a little more?

PESONEN: I don't know. I really don't know. [Laughter] I know they'd rather not have the Z'Berg-Nejedly Forest Practices Act, and that's never going to change. They are in it for business, and it constrains their business. They are never going to get used to that.

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From the Oral History of

BRUCE S. HOWARD

Board Member, President, Councillor of Save The Redwoods League, 1963–2003

Interviews conducted by Ann Lage in 2003, Regional Oral History Office, The Bancroft Library, UC Berkeley.¹

LAGE: We were going to start today talking about the biggest, most public issue having to do with the redwoods, which has to do with Pacific Lumber, and you were reminded of a story. Start with that story.

HOWARD: I was reminded that before the takeover by [Charles] Hurwitz, Howard Jones, chairman of the board of Pacific Lumber invited John Dewitt and myself to lunch at the PU [Pacific Union] Club, and we had a very pleasant lunch. Then it was at that gathering that he told us that it was very possible that Hurwitz had the upper hand on this unfriendly takeover.

¹ Presented here is a brief excerpt from Bruce S. Howard “Board Member, President, Councillor of Save The Redwoods League, 1963–2003,” an oral history conducted by Ann Lage in 2003, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2005. © 2005 by The Regents of the University of California.

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The whole thing would be very much different than it was before. So that was a blow, and we didn't understand. The interesting thing is that prior to that time, [it was] the largest company that we dealt with — the Save The Redwoods League dealt with — we bought the largest amount of acreage from the Pacific Lumber Company.

LAGE: You'd always had a very high opinion of the company, as I understand.

HOWARD: Oh very, and they were always very fair. We bought Pepperwood Grove, we bought the Fern Canyon. We bought a lot of the Prairie Creek from them. It was a very nice relationship. They were most cooperative and very helpful to us.

LAGE: That was Mr. Jones who was head of Pacific Lumber?

HOWARD: Yes, he was the chairman of the board.

LAGE: Did they feel that they had no choice? Could they have fought that takeover in some way?

HOWARD: I think by the time they realized what Hurwitz had done, preliminarily, it was too late. They just couldn't fight it by that time.

LAGE: And it was sort of early in that takeover phenomenon.

HOWARD: Oh, that's right. It was one of those early takeovers. That was a great blow. Just recently, this is 2003, Save The Redwoods League made its first purchase of any land that's owned by the Pacific Lumber Company, since Hurwitz took over.

LAGE: Oh, now I hadn't realized that.

HOWARD: Yes, we just bought a small parcel from them, over in the Grizzly Creek area. We could not meet step one with them. The man that we used to deal with in the early days, who then, under Hurwitz, became the president of their lumber operations.

LAGE: Was that John Campbell?

HOWARD: He was based in Scotia. He had to do what he was told.

LAGE: But he had been with Pacific Lumber previously.

HOWARD: He had been with Pacific Lumber previously. We couldn't get to base one with him. His superiors wouldn't let him go to base one.

LAGE: Would he ever let down his —

HOWARD: Yes. He and Katie Anderton — he's retired now — have had a very good relationship. I think, on several occasions, he let it be known that he couldn't get out fast enough, but I think he had to look out for himself, which one has to do in this life. Then he finally retired.

LAGE: I noticed in the minutes there seem to have been several attempts in the eighties, to buy, or at least to offer Pacific Lumber money for —

HOWARD: We were negotiating with them for Grizzly Creek, which is out Highway 36. We felt it was a very fair offer, in other words, the negotiations. We just could never get to the point where you get into serious negotiations. They just wouldn't allow it. They just wouldn't allow it.

LAGE: Did you ever deal above John Campbell, with Mr. Hurwitz, himself, or others?

HOWARD: No, no. We never were permitted to go beyond John Campbell. I don't think we really wanted to. [laughter]

LAGE: Did you get in on the negotiations personally?

HOWARD: I was in on some of the early negotiations, yes, with John. He's a nice guy, but his hands were tied. It was too bad because they had some wonderful properties that we wanted to participate in.

LAGE: The big brouhaha was over the Headwaters Forest. Did Save The Redwoods League play any kind of a —

HOWARD: The Save The Redwoods League played hands off in the background. We supported a lot of the parties that protested.

LAGE: Now tell me about that. How did you support the parties that protested?

HOWARD: We let it be known to them that however we could help, let us know. For the most part, we played a very quiet role in that. It's interesting to know that when you get into a negotiation, when they get into all kinds of negotiations, where the federal government and the state government are involved, where taxpayer money is involved, there seems to be no limit to how high they can go. We had had the Headwaters Forest appraised.

LAGE: How early on?

HOWARD: Oh, maybe three years before all this brouhaha came up. It was worth, according to the appraisal that we got, it was worth about a third of what the state and federal government paid. They just gave money away.

LAGE: But on the other hand, they not only bought the Headwaters, which was only three thousand acres, but also this fifty thousand additional acres.

HOWARD: The surrounding area, that's right. Our position in this was that we couldn't really do much. We decided that rather than make enemies out of everybody, we just kept quiet, for the most part.

LAGE: I saw several news reports that said the Save The Redwoods League has identified Headwaters Forest as a marginal forest. Is that correct?

HOWARD: Yeah, well, because it's so steep. It's a terribly steep terrain. John and I walked over it, and it's for a mountain goat. It's a beautiful stand of redwoods. On the other hand, it would not be very easy for a lot of the general public to negotiate to see the whole thing.

LAGE: It seems as you talk, that you were thinking about recreational use, and it became something much bigger. It became habitat preservation.

HOWARD: Oh, absolutely. It did. There's no question that it was an important acquisition, but it got out of hand. When we saw where the direction that the negotiations were going, the panic that everybody put behind it, and the price was going up and up, we said, "Back out, back away. Don't have anything to do with it."

LAGE: I think it was called sort of the last remaining virgin, or the biggest remaining virgin redwood stand.

HOWARD: I think that's absolutely true, although, I think in many cases it was exaggerated. I think that's where they get their leverage, that this is the last, and what are we going to do, and so forth.

LAGE: I'm going to shift this just a little bit. So many people got in on the [Headwaters Forest controversy] — the radical environmentalists, all the celebrities. What did you think of those more radical groups, like Earth First!?

HOWARD: We had a meeting in that general area, at the Women's Federation Grove. Oh, I know, we had our seventy-fifth birthday and party at the Founders' Grove, where it was rather interesting. We had planned on a

thousand people — there must have been three thousand there, because as we came into the park, out on the parking area across the bridge —

LAGE: Where was it at?

HOWARD: At the Founders' Grove.

LAGE: In relation to the Headwaters.

HOWARD: Well, this is further south. Headwaters is on Highway 36. This was at the Founders' Grove, but this was a big issue at that time. All the radical groups were there.

LAGE: They came to your party?

HOWARD: They came to our party. They were, for the most part, pretty polite. One lady couldn't keep quiet, and they quieted her down. As we drove in to park, the catering — the Eureka Inn was catering it. And he was just frantic, and was just roaring off to Eureka to get enough food to feed them, because he'd figured on a thousand. He did very well. He dug up extra food. It was a fun program and so forth. Then we walked over to the Women's Federation Grove, which is about a half a mile away. These radical groups sort of set up, not picket lines, but just harassing lines.

LAGE: Of the Save The Redwoods League?

HOWARD: Against the Save The Redwoods League.

LAGE: What were they wanting you to do?

HOWARD: Well, they wanted us to put in much more vocal position, in opposing the acquisition of the Headwaters Grove. We just didn't play a loud enough role for them.

LAGE: Do you remember when that seventy-fifth anniversary was?

HOWARD: Oh dear. It would have been probably around '94, '95?

LAGE: I see. That was after the Redwood Summer.

HOWARD: Right, the wild summer.

LAGE: Did you ever have any actual meetings of people from Earth First!, or, I guess the other organization was, EPIC?

HOWARD: No, we never had any official meetings with them, no.

LAGE: I know that they wanted you to endorse the Forest Forever Initiative.

HOWARD: The concept, yeah.

LAGE: That was 1990, also.

HOWARD: That was 1990.

LAGE: What was the league's thinking about that?

HOWARD: Well, it just seemed to me that I think we talked about it at the board meeting — maybe a couple board meetings. We decided that, hey, we've got our own policies. We've got our own mission. Why get involved with that? We just sort of pushed it to the side and politely told them we weren't interested.

LAGE: Another thing they seem to want you to do, [it seems] from the minutes, was not to negotiate with Pacific Lumber, over buying parcels.

HOWARD: Right, and that we would not accept. But it didn't do us much good because we didn't make any progress.

LAGE: [Laughter] big difference of that. It became really a federal, state, and environmentalist and Pacific Lumber Company negotiation — sounded tremendously complex.

HOWARD: It was.

LAGE: Did Save The Redwoods League get involved in any of that? Those machinations?

HOWARD: No, actually, we just sort of tippy-toed around the whole thing, keeping in close watch of what was going on, of course, but we just stayed on the outside fringes, and didn't really get terribly involved.

LAGE: That's great. What do you think about the outcome? Do you personally, or the redwoods league, embrace this idea of saving whole habitats?

HOWARD: I think any time, anybody can save redwoods, and set them aside and acquire them, that's the name of the game. That's the game we're in too. So, we certainly applauded that. Oh yeah.

LAGE: What about the spotted owl? You know, everything got mixed up in it — the marbled murrelet, and all that. Does that seem just like an excuse, or —

HOWARD: They were all just issues, and the panic of being the last of the redwoods and so forth all contributed to this higher and higher escalation of the price, which scared us to death.

LAGE: It came out to about five hundred million.

HOWARD: Oh, it's just incredible, just incredible. Well, anyway, the redwoods were saved.

LAGE: Right, seventy-five hundred acres of old growth, it sounds like.

HOWARD: Right, old growth.

LAGE: And a huge ecosystem. It's a very interesting —

HOWARD: It was a very interesting issue.

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From the Oral History of

WILLIAM W. WOOD, JR.

*Program Director, Agricultural Economist,
UC Riverside Cooperative Extension*

An interview conducted by Robin Li in 2008, Regional Oral History Office, The Bancroft Library, UC Berkeley.¹

WOOD: In 1961, I started taking my classes at Berkeley and finished them in '63, took my exams in '63, started doing my dissertation. Visited with a lot of people, read a lot of material, prepared the document. I defended that actually in '65. In the meantime, in the spring of '64, Cooperative Extension of UC inquired as to whether I would be interested in going to Riverside for a new position that they were creating. . . .

LI: So could you tell me what your average day was like for you as a program director? Who would you be talking to, what kinds of things would you be doing?

¹ Presented here is a brief excerpt from William Wood, "Taking the University to the People: University of California Cooperative Extension," an oral history conducted by Robin Li, Ph.D., 2008, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 2009. © 2009 by The Regents of the University of California.

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WOOD: I would say that the typical day was — there'd be a short portion of that day devoted to talking to and working with colleagues on their programs. . . .

LI: And how many people would you be overseeing at a given time?

WOOD: Twenty-five.

LI: And they were all specialists with particular areas?

WOOD: Yes. And they'd be at one, two, three, four different locations, for the most part. Then at least half of every day was devoted to program. Keeping abreast of what's happening, and this would be, as the years progressed, starting in 1966, with the passage of the California Land Conservation Act, the Williamson Act, I started spending more and more time on land policy. And I'd say, when I retired, that was — between water and land, that took up — since the last two years, there was no longer a program director. So I was back to being a specialist, 75 percent of my time was devoted to that. At the beginning it was small. In the course of that, it was made up of three or four components. One was, with some colleagues, we tried to do research on what constitutes land conversion and changes in land use through research projects. Secondly, working with either legislative committees, or more particularly with the state agencies involved in agricultural land. Third, it involved working a great deal with farm advisors and county government. . . .

LI: So you were talking about your interest in land policy following 1964, the Williamson Act. Was there a specific project that you can think of that kind of encapsulated the issues you really thought were critical to —

WOOD: It's difficult to put it into a project context, but let me talk a little bit about the history and how it evolved. Because there have always been some major problems associated with land and water. But let's talk about land for a while, because California has spent more time looking at water than it has land, and it still hasn't resolved that. When Proposition 13 was passed by the voters of California, that made quite a big difference, but that wasn't passed until after the state had already adopted the Williamson Act. Now, the California Land Conservation Act, also known as the Williamson Act — the author's name was John Williamson; he was the assemblyman from Tulare County. I think he had been county assessor

before getting elected to the Assembly. And he brought together a group of people, and they developed what became the Williamson Act. It was important because up until that point, because there had been a number of scandals in assessor's offices in various counties around the state in the '50s, where preferential treatment was given to certain landowners. The state Constitution essentially said that the land shall be appraised on its market value. Well, subsequent to World War II the demand for land in this state soared. So you had people paying exorbitant prices, and part of it was the Internal Revenue Code about which I talked earlier. Part of it was just to get a piece of the area.

The ones having the most difficulty at that time were the cow-calf operators, the livestock people. Because technically they had thousands of acres, because the animal-unit-months on typical rangeland in California is not very high. As a result, it wasn't at all unusual to find someone in the cow-calf industry for whom annual property taxes exceeded gross revenue. So the big push was from them, but all farmers were facing the same problem. The Williamson Act came along, and it essentially said that if a landowner goes in a ten-year contract that's automatically renewed every year unless you take explicit action — now that's based on the principle that most of us forget to take explicit action. Therefore, it can work in perpetuity. That land would be assessed based upon the value of return on investment.

LI: Right, rather than on the square footage.

WOOD: Well, rather than on market value.

LI: Right, I see.

WOOD: See, if the market said somebody will pay \$5,000 an acre for this land, and if you capitalize what you're making on the crop, and it turns out to be \$1,200 an acre, up until that point, the assessor was supposed to tax it on the basis of five. The Williamson Act contract said you can't assess it for more than \$1,200. So that made a big difference. The difficulty is that it was sold on the basis of protecting prime land, that very best delta land, that's the most productive. But that's the land closest to cities, and that's the land where the owner says, "I'm going to capitalize; when it gets to ten I'll sell." Now, we're talking 1950s. The Williamson Act was adopted by more non-prime land than the prime growers, or landowners, because they had fewer

options. And it did not do a whole lot on that land that people like Charles Warren, who was the assemblyman from Wilshire District, L.A., was a big supporter of the Williamson Act. He wanted to save prime land, but this really had very little impact.

Now, there are some other factors involved that made it very difficult then, still make it difficult. Number one, all land-use policies, by and large, are the responsibility of city and county governments. And the state runs into difficulty every time it mandates what local governments shall do. Secondly, the amount of prime agricultural land, I mean really productive land, is not equal among counties. And so the question rises, what interest do people who reside in San Francisco have as far as land decisions made in Tulare County? The citizens of San Francisco say, we're very concerned, because that's our food supply. The people of Tulare County say, look, we have local autonomy; we're not going to let you dictate what we're going to do. So this constant conflict between local autonomy and statewide goals was not resolved then; it has never been resolved.

LI: So did you find yourself speaking a lot to county politicians and officials?

WOOD: I found myself speaking to numerous boards of supervisors, to citizens' groups, in urban settings, in very rural settings. And what came out of that is that the very simplistic idea of trying to keep our productive capacity for food is so complex, I coined a phrase, how comprehensive can planning go before it becomes incomprehensible? Because there are so many of these considerations. The source of most revenue at both city and county is property tax. So first of all you're dealing with their autonomy. Then you're dealing with their revenue source. And then you're saying that here in this nice, rural county, you're going to let those idiots in L.A. and San Jose and San Francisco dictate what we do. That has nothing to do with local autonomy. That has to do with the fact that those individuals who have a bucolic area would rather have an income. Those people who live in some parts of San Francisco would rather be able to go see a bucolic environment.

LI: So was the tension between developing land for other uses and —?

WOOD: It got to the point where that was the battleground.

LI: So it was like, shopping malls or orange groves?

WOOD: Yeah. And Riverside's a good example of things gone wrong. This had more navel oranges than any other place in the world when we moved down here in 1964, and a lot of them had been removed by then. They have a large area that's quote "reserved for navel oranges or agriculture" unquote. No. It's mostly development now. And the reason is very obvious. From the urbanite's perspective, we'd like to keep those orange groves, but we want the economic activity. We want employment, we want sales in our business, et cetera, which means we want more people. Where are you going to put them? Build houses. Where are you going to build houses? In the orange groves. From the producers' standpoint — and there are some producers who have stuck it out. But I know one grower, a large grower in this western Riverside area, who says his annual cost just of picking up trash that people throw under his groves runs way over a hundred dollars an acre.

LI: Wow. That's a new problem, I'm sure.

WOOD: That's right, let alone you can't use chemicals. The water rates are still differential for agriculture, but not as much as they used to be. Labor becomes a problem. Theft and vandalism becomes a major problem. So most of those growers said, bless you, if I can get more than my investment out, I'll go live somewhere else. The navel orange production now is predominantly in the San Joaquin Valley, where they've had equal problems, because they don't want to lose their opportunity for urban development. And if you look at Visalia, for example, one side is highly productive land. The other side is not very productive land; it's got hardpan. It's also not very good for putting up houses. [laughter] So what happens? The other problem, of course, is dairies out of Chino have moved up there. The most recent interesting conflict was between dairy operators and tree fruit growers in Tulare County over water quality. You can't win.

Anyway, the Williamson Act was voluntary. It was adopted by most counties but not all. Used by a few in conjunction with their county plan. Others used it just to keep the landowners quiet, which was not a particularly good way, because you ought to coordinate it, in terms of areas that you want to keep as agriculture. But that's never been a high priority for most county governments, certainly not for Riverside, and not for San Diego. It is, today, for Los Angeles, when it's too late. [laughter] So, there you have it.

The whole issue of land is then further compounded by the fact that our heritage is the family farm. And the family farm in California is your retirement account. And if you take away the value of that retirement account, what do you do? Now, that's not always the problem, but it's still a major part of it, that the way a lot of small farmers retire in California is by selling to someone who has ideas of development, at a price higher than what the capitalized value is from agricultural products. So all of these factors come together.

LI: Do you think this issue of land policy was particularly difficult for California Extension, versus other states, because of the population and the — ?

WOOD: I think it was more difficult in California for two or three reasons. Number one, the population pressures on California are much more severe than anybody except maybe Florida. Now, in Arizona, the pressures were on water, not on land. Secondly, the nature of our land resources, if you go to counties in the Corn Belt, there are variations, but most of the counties, most of their land is highly productive land for those kinds of crops. So the fact that County A decides to develop and County B wants to remain agricultural is not a statewide concern. It may be a concern of how much land we take out in total, but not in terms of those two counties. In California, if you take out Monterey County, or Fresno or Tulare County, you've taken out a good part of our productive capacity.

Now, there's one other aspect of this that I find fascinating, and it's fun to do it with a group. We produce far in excess of 250 commercial agricultural commodities in this state. And I'll meet with a group and say, included in that is probably thirty different vegetable crops, commercially grown. We don't need thirty different — nutritionally, we don't need that many choices. So let's start cutting down, and I always say, "Okay, now, first one to go is eggplant. Can you hear me, dear?" And in the group, I say, "How many are willing to give up eggplant?" And a few will raise their hands, and there's half of them who like eggplant. I don't happen to like eggplant. Pick another vegetable. I said, therein lies one of our major problems, in terms of planning the resources for agriculture. We could get by with a lot less land if we said, sorry, folks, no more consumer choice. You get one nut, one fruit, two vegetables, one green, one yellow [laughter] — it would be so much easier if I were the czar.

But that's not the nature of the beast. And to cater to consumer choice — it's interesting as a sideline, all of the attention now on energy consumption, the one thing that's going to begin to take its toll is our ability every day of the year to get any fresh fruit or vegetable we want. Those days are numbered. When gasoline or fuel gets up to ten dollars a gallon, you're going to stop getting fresh fruit from Chile in the winter. You'll stop getting fresh vegetables in the winter from Mexico. And it's consumer choice that has driven — the consumer choice in Iowa or Illinois is not an issue. You're going to raise corn and soybeans. What else do you do?

LI: And they import most of their food.

WOOD: Right. I never will forget, I was sitting in a meeting, and an assemblyman whose name I can't remember, or where he was from. He was an urban assemblyman. So the group made the observation in the same context. He said, "You don't need to save land for avocados. Let them grow them in the Dakotas where nobody wants to live." Which turned out to be a very good example, because you can just eliminate avocados from your diet. It wouldn't bother me particularly, but there's some people that it would be a major loss.

So the whole issue of land, and to a large extent water for agriculture, is compounded by all of these other variables in the policy process. There is the matter of, what level of government do you want to make decisions? How do you want to protect the grower who has his investment in there? How much choice do you want to give to consumers? If a county has a significant amount of prime land and no one else does, should they be required in perpetuity to be the food bank and not have the economic growth? In water, how short in food supply should we get before we cut off irrigation to agriculture, instead of shipping it to Los Angeles? These were all critical issues, and there really is no resolution. My definition of a public policy is where there's no best answer.

There may be a best answer for me, there may be for you. But anytime somebody comes along and says, on energy policy, here's the best answer, here's the solution to everything, wrong. I don't care what it is; it's wrong. And that's one of the things that's been hard to get across. And I would say, in summary of my quote "educational career" unquote in Cooperative Extension, in the area of land and water, it's been the effort to help make

people understand the complexity of issues and to avoid the single-valued solution. The good resolution of a public policy issue, at the local level, is where everybody is equally unhappy. And I think that's a good message to remember. Because if somebody's happy, then you better watch out. I think it sounds like a sermon as much as anything. See, a part of that time period I spent in educating our advisors on the public policy education process. That's where the political science and the agricultural economics came together very well. And I gave weeklong seminars for all of our county directors on public policy education, how you help your clientele without taking sides. Help them define what the issue is. Help them identify what the alternatives are. Help them identify the impacts of the alternatives. And then a political decision is what comes next, and you're not part of that.

LI: Right. You give them the tools for them to negotiate the political decision.

WOOD: That's right. And I'd have to say that looking back on thirty-some years in the university, the one thing about which I'm most proud is that Extension personnel got much more comfortable on sticky policy issues. And you can't avoid them if you're working with people day in and day out. I remember a state senator from Fresno, who shall remain unnamed. We were at a public meeting, and he came up to me afterward, and he said, "Bill, one of these days you're going to have to take a position." I said, "George, if I took a position against your pet project, how reliable would my analysis be in the future?" "Well, but you've got to take a position." I said, "No. My role is not to take positions. My role is to help people understand what their options are and make informed decisions. I don't have to agree with them." And it was a very good lesson.

One other quaint story. The most valued compliment I think I ever got is a fellow that I'd known for a long time. We had a seminar in Modesto, all day. At the end of the day, I'd given two presentations, and I'd chaired a discussion group. He came up and said, "Dr. Wood, I don't understand. I still don't know [where] you stand on this project. I couldn't get a glimmer of an idea." I said, "Thank you. That was my objective."

ARTICLES

SEI FUJII:

An Alien-American Patriot

SIDNEY K. KANAZAWA*

BACKGROUND OF THIS ARTICLE

A few years ago, I was approached to represent the Little Tokyo Historical Society and the Japanese American Bar Association to seek the posthumous admission of Sei Fujii to the State Bar of California. At the time, I knew nothing of Fujii and had never heard about the profound impact he had had on the rule of law in California. I was unaware of Fujii's role as the plaintiff in the landmark 1952 case of *Fujii v. California*,¹ in which the California Supreme Court eloquently struck down California's Alien Land Law on constitutional grounds, despite a U.S. Supreme Court precedent that upheld the same law only thirty years earlier.² Just seven years after ending the war with Japan, in the heartland of pre-World War II anti-Japanese sentiment,³ the majority, concurring, and dissenting opinions of

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¹ 38 Cal.2d 718.

² *Potterfield v. Webb*, 263 U.S. 225 (1923).

³ [UNITED STATES] COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* (1982; reprint 1997); John Leo, *An Apology to Japanese Americans*, TIME, Jan. 24, 2001; Stuart Anderson, *When America*

the California Supreme Court challenged past justifications and cemented the foundation for a new postwar vision of civil rights under the United States Constitution, two years before the Warren Court's *Brown v. Board of Education* decision.⁴

The executive producer (Fumiko Carole Fujita) and director (Jeffrey Gee Chin) of the award-winning movie *Lil Tokyo Reporter* began my education about Fujii based on their own research for the film which dramatically documented part of Fujii's life as the founder of a newspaper in Los Angeles' Little Tokyo. Indeed, years earlier, neither Fujita nor Chin had heard of Fujii and only learned about him when his name emerged in the context of their research about the Japanese Hospital in Boyle Heights that Fujii helped to establish in 1929.

As I listened to Fujita and Chin unfold the story of Fujii, I was joined by an associate, Kimberly Nakamaru, who closely identified with parts of the story and wished she had heard it earlier. Her grand-aunt, Dr. Sakaye Shigekawa, a physician born in South Pasadena, California, in 1913, the year the Alien Land Law was enacted, had just died in 2013 after delivering 20,000 to 30,000 babies over her career, mostly in the Japanese community of Los Angeles. Dr. Shigekawa's father had emigrated from Japan and was a part-owner of a hog farm, but his name was not on the deed because of the Alien Land Law.⁵

Imprisoned Japanese Americans, FORBES, Feb. 18, 2017; Brian Niiya, *Fifth Column*, <http://encyclopedia.densho.org/Fifth%20column> (last visited Aug. 29, 2017) (Fear based on a lack of evidence of espionage or sabotage justified the incarceration of Japanese to then-Attorney General Earl Warren and West Coast Military Commander General John DeWitt); *but cf.*, TOM COFFMAN, *HOW HAWAII CHANGED AMERICA: THE CAMPAIGN FOR EQUAL TREATMENT OF JAPANESE AMERICANS IN THE WAR AGAINST JAPAN* (2014) (The military governor, Gen. Delos Emmons, Army intelligence commander, Col. Kendall J. Fielder, and FBI Hawaii station chief, Robert Shivers, took the opposite view about the absence of evidence of espionage and sabotage and extended trust rather than fear to the Japanese community in Hawaii, risking their careers by their defiance of the president's calls for incarceration of Japanese in Hawaii as on the West Coast.).

⁴ 347 U.S. 483 (1954).

⁵ After the bombing of Pearl Harbor on December 7, 1941, all of the Japanese staff at the Los Angeles County Hospital, including Dr. Shigekawa who was doing her residency there, were dismissed. She briefly worked at another hospital before being forced by Executive Order 9066 to give up her home and practice to be incarcerated at the Santa Anita Race Track Assembly Center where, at 29 years old, she was one of seven physicians (the youngest and only woman) caring for nearly 19,000 other Japanese suddenly uprooted and deposited in horse stalls for the next seven months before they were

Oral histories from Fujii's descendants and close associates assisted Fujita and Chin in their research. They followed up by scouring the UCLA library for old newspaper articles by Fujii and about Fujii.⁶ As the picture of Fujii emerged from these puzzle pieces, questions kept racing through their minds: Why haven't we ever heard of Fujii before? What can Fujii's story teach us today? Are we repeating history?

Fujita and Chin's film *Lil Tokyo Reporter* recounts Fujii's life as the founder of *Kashu Mainichi*, a Japanese- and English-language newspaper that confronted the unlawful acts of organized crime in Little Tokyo and, at the same time, promoted the positive contributions of second-generation Japanese (Nisei) who were born in California and were beginning to succeed on their own in the years before World War II. His newspaper attempted to protect Japanese farmers who would venture into Little Tokyo and visit entertainment clubs where they would be swindled and robbed. His warnings and attacks on organized crime sparked an attempted assassination that he survived only because the Japanese Hospital that he helped to establish in 1929 admitted him, kept him alive, and nursed him

dispersed to other detention centers in desolate areas for the balance of the war. Like Dr. Shigekawa, two-thirds of those incarcerated were U.S. citizens, born and raised in the U.S., who had committed no crime other than looking like the enemy. Dr. Shigekawa returned to Los Angeles in 1948 and set up her lifelong practice near where she grew up as a child. She was inspired to become a physician because of the influenza epidemic that affected her father and also prompted the establishment of the Japanese Hospital that Fujii helped to set up in 1929. Jocelyn Y. Stewart, *For Doctor, Time Has Much to Heal*, LOS ANGELES TIMES, Dec. 28, 1999; *Pioneering Nisei Doctor Sakaye Shigekawa Dies at 100*, RAFU SHIMPO, Oct. 28, 2013; Alison Bell, *Santa Anita Racetrack Played a Role in WWII Internment*, LOS ANGELES TIMES, Nov. 8, 2009; *Santa Anita (Detention Facility)*, http://encyclopedia.densho.org/Santa_Anita_%28detention_facility%29 (last visited Aug. 28, 2017).

⁶ Historical references in this article to Sei Fujii's life are based on the research by Fujita and Chin. In addition to reviewing newspaper articles from Fujii's paper and other publications during this time period, Fujita and Chin interviewed members of Fujii's family, the daughter of J. Marion Wright, and Kenichi Sato who published a biography in Japanese on Fujii's life, *LOS ANGELS GIGYŪ ONDO: HAINICHI TOCHIHŌ O HŌMUTTA FUJII SEI NO KIROKU* (1983). They also searched the "Santa Fe Internment Camp File: Sei Fujii," Los Angeles Evacuation District, National Archives at Riverside, U.S. Department of Justice, 1944 (RG 85, F 15942, sub-file 1720) and gathered pictures and stories from former residents of Little Tokyo. They are in the process of publishing a biography about Sei Fujii that gathers together the research they have collected.

back to health. In addition to a newspaper, Fujii started a radio program to familiarize the larger Los Angeles community with young Japanese Americans who were making their mark and contributing to the growing Los Angeles community. As the winds of war with Japan began to swirl, Fujii wrote a book and published articles telling Japanese in the United States how they could show their loyalty to the United States and tamp down the rising flames of anti-Japanese sentiment that were spreading throughout California. Fujii also worked to build cultural and commercial bridges between the Japanese community and the larger Los Angeles community by starting the annual Nisei Week Festival in Little Tokyo and the Japanese Chamber of Commerce.

HISTORICAL BACKGROUND

In contradiction to its rule of law, culture, and Fourteenth Amendment emphasis on equal protection, the United States, and California in particular, displayed a history of overt discriminatory hostility toward Asians as a distinct class of “others.” Even before the 1882 Chinese Exclusion Act, there was a perception that Asians were “a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point.”⁷ Hostile sentiments toward Chinese led to the formation of the Working Men’s Party of California in 1877 and a constitutional convention (with one-third of its delegates from that party) that specifically changed the California Constitution to discourage Chinese from residing in the state.⁸ Violence against Chinese prompted the federal 1882 Chinese Exclusion Act and the decline in Chinese migration to the U.S. from that date forward.⁹ This was followed by a rise in Japanese immigration and the transferred resentment of white workers in California “adroitly exploited by the political agitators anxious to secure the labor vote.”¹⁰

⁷ *People v. Hall*, 4 Cal. 339, 404–405 (1854) (reversing the conviction of a free white citizen’s murder of a Chinese victim based on the trial court’s erroneous admission of testimony from witnesses of Chinese descent, which was interpreted as contrary to the rules of admissible evidence).

⁸ Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61, 62 (1947).

⁹ *Id.* at 63.

¹⁰ *Id.* at 64.

By 1905, the Asiatic Exclusion League was organized in San Francisco for the purpose of reducing or eliminating emigration from Asia and to segregate Japanese children from white children in school.¹¹ In 1906, the San Francisco Board of Education passed a resolution segregating Japanese pupils from white pupils in the public schools which was immediately protested by the Japanese government. This prompted President Theodore Roosevelt to step in and forge the 1907 “Gentlemen’s Agreement” with the Japanese government to limit passports to the United States in exchange for rescinding of the Board of Education’s resolution. This did not quell the anti-Japanese campaigns in California which increased after the 1911 U.S.–Japan Treaty that protected the right of Japanese nationals to lease land for residential and commercial purposes.¹² Hostility toward the Japanese was driven by fear. Unlike the Chinese,

the Japanese were seen as threats to the American body politic from both within and without. They were seen as threats from within . . . [for their low wage job–stealing potential, like the Chinese]. The Japanese, however, were also perceived as a threat from without. Japan’s growing industrial strength, its imperial military aspirations in the Pacific and the defeat of Russia in 1905, collectively enticed American politicians to inscribe on Japanese immigrants an image of disloyalty and allegiance to a threatening foreign military power. They were portrayed as an imminent fifth column threat within the United States waiting to be activated at the emperor’s command . . .¹³

FUJII’S EARLY LIFE

In 1882, Sei Fujii was born in Iwakuni, Yamaguchi Prefecture, Japan, seventeen years after the assassination of President Abraham Lincoln and fourteen years after the enactment and ratification of the Fourteenth Amendment to the United States Constitution. He was born into a family of the former

¹¹ *Id.*

¹² *Id.* at 65–67.

¹³ Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 44–47 (1998), <http://lawdigital-commons.bc.edu/cgi/viewcontent.cgi?article=1182&context=twlj>.

samurai military nobility. His father died when he was three and he was raised by his grandfather who instilled in him the Bushido Code of samurai principles such as justice, courage, compassion, respect, integrity, honor, loyalty, and self-discipline. Though strong within his own family, the Bushido Code and the public respect for the samurai were waning in the aftermath of the 1868 defeat of the Tokugawa shogunate (the last pre-modern period of feudal military rule by the Tokugawa clan) and the beginning of the Meiji Restoration (the early-modern period of “enlightened rule” by the emperor).

In 1903, Fujii traveled to the United States. He arrived in Seattle on July 3rd, 1903 and saw for himself, on his first full day in America, the celebrated pride of the United States in its rule of law culture that exalted concepts



SEI FUJII ON
GRADUATING FROM
USC SCHOOL OF
LAW IN 1911.

*Photo courtesy of Little
Tokyo Historical Society.*

similar to the Bushido Code. He was impressed.

He studied for four years at Compton Union High School in Southern California while working as a houseboy for the family that established the Ralph’s supermarket chain and diligently perfected his English language abilities in the process.

In 1908, he attended the University of Southern California School of Law and immersed himself in the rule of law despite a steady drum-beat of anti-Asian, and particularly anti-Japanese, sentiments that made it impossible for him to become a naturalized U.S. citizen or a lawyer when he graduated.¹⁴

In the course of his studies, he met a fellow student, J. Marion Wright, who shared Fujii’s

¹⁴ In re Hong Yen Chang, 84 Cal. 163 (1890) (refusing to allow non-white Asians to become lawyers because of their inability to become citizens); Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 SETON HALL CONST. L.J. 103, 126–131 (1996); In re Hong Yen Chang on Admission, 60 Cal.4th 1169 (2015) (admitting Hong Yen Chang posthumously to the State Bar of California and discussing California’s history of denying bar membership to Asians who could not become citizens due to discriminatory immigration laws); ADMINISTRATIVE ORDER 2017-05-17 (S239690), 394 P.3d 488, 2017 CAL. LEXIS 3768, ***1 (Cal. 2017) (admitting Sei Fujii posthumously to the State Bar of California); Leonard Siegel, *Aliens and the Practice of Law: Rafaelli v. Committee of Bar Examiners*, 6 LOY. L.A. L. REV. 398 (1973) (discussing exclusion of alien lawyers from admission to the bar).

sense of justice, courage, compassion, respect, integrity, honor, loyalty, and self-discipline.

In 1911, Fujii graduated from law school and fell in love with a woman named Same Sato, the beautiful wife of a local bookstore owner. After Sato gave birth to Fujii's first son in America, they ran off together to Japan.

FUJII WORKS TO OVERTURN CALIFORNIA'S ALIEN LAND LAW OF 1913 AND TO REMEDY OTHER INJUSTICES FACING LOS ANGELES' JAPANESE COMMUNITY

During his two-year absence from California, Fujii received a steady flow of letters from Wright and friends in Los Angeles about the increasing hostility toward the Japanese community and the enactment of the Alien Land Law of 1913 that targeted Japanese farmers who had turned deserts into the most productive farmlands in Southern California.¹⁵ Although neutral in language, the law's focus on denying land ownership to aliens who could not become U.S. citizens was unmistakably directed at Japanese farmers and only Japanese farmers:

By its terms the land law classifies persons on the basis of eligibility to citizenship, but in fact it classifies on the basis of race or nationality. This is a necessary consequence of the use of the express racial qualifications found in the federal code. Although Japanese are not singled out by name for discriminatory treatment in the land law, the reference therein to federal standards for naturalization which exclude Japanese operates automatically to bring about that result.¹⁶

¹⁵ *Fujii v. California*, *supra* note 1, at 742 (“The Japanese were pioneers who reclaimed the San Joaquin Valley from the desert. They turned this land from “its unhealthy barren state of wasteland into the richest and most productive district in the state of California.” Through sheer perseverance they gained control of the berry, potato, flower and truck-garden markets,” quoting MILTON R. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 157 (1946)); *see also Oyama v. California*, 332 U.S. 633 (1948) (deciding a San Diego Alien Land Law case on non-constitutional grounds but concurring opinions urged overturn of law on constitutional grounds); Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979 (2010) (exploring the historical and political background of the case).

¹⁶ *Fujii v. California*, *supra* note 1, at 729.

To white California farmers, Japanese farmers posed an economic threat that needed to be quashed.¹⁷ As stated in Justice Frank Murphy's dissent in *Oyama v. California* (1948):

The California Alien Land Law was spawned of the great anti-Oriental virus which, at an early date, infected many persons in that state. The history of this anti-Oriental agitation is not one that does credit to a nation that prides itself, at least historically, on being the friendly haven of the tired and the oppressed of other lands. Beginning in 1850, with the arrival of substantial numbers of Chinese immigrants, racial prejudices and discriminations began to mount. Much of the opposition to these Chinese came from trade unionists, who feared economic competition, and from politicians, who sought union support. Various laws and ordinances were enacted for the purpose of discouraging the immigrants and dramatizing the native dissatisfaction. Individual Chinese were subjected to many acts of violence. Eventually, Congress responded to this popular agitation and adopted the Chinese exclusion laws. . . . [T]he arrival of the Japanese fanned anew the flames of anti-Oriental prejudice. . . . Numerous acts of violence were perpetrated against Japanese businessmen and workers, combined with private economic sanctions designed to drive them out of business. . . . Campaigns were organized to secure segregated schools and to preserve "America for the Americans."¹⁸

In 1913, Fujii returned to California as Wright was graduating from law school and for the next forty years Wright and Fujii worked together to defend and promote the dignity of the Japanese community in Southern California. They represented Japanese farmers falsely accused of distributing harmfully

¹⁷ Aoki, *supra* note 13, at 54 n.49; Fujii v. California, *supra* note 1, at 735:

"It is generally recognized, however, that the real purpose of the [Alien Land Law] was the elimination of competition by alien Japanese in farming California land. . . . A former attorney general of California declared that the basis of the alien land law legislation was 'race undesirability' and that 'It was the purpose of those who understood the situation to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the State by aliens ineligible to citizenship, — in a practical way to prevent ruinous competition by the Oriental farmer against the American farmer.'"

¹⁸ *Oyama v. California*, *supra* note 15, at 651–653 (Murphy, J., concurring).

contaminated produce, Japanese who were unpaid for their services, Japanese injured in accidents, Japanese swindled by gangsters, Japanese facing government fines, penalties, and criminal prosecution, and in many other matters besetting the lives of Japanese in Southern California — Wright with a law license and Fujii without. This lifelong partnership continues even today in the monument erected in Little Tokyo to honor Sei Fujii. The plaque on the



AT THE SEI FUJII MEMORIAL LANTERN IN LITTLE TOKYO'S JAPANESE VILLAGE PLAZA, ERECTED BY THE LITTLE TOKYO HISTORICAL SOCIETY (LTHS).

(L.-R.) LTHS DIRECTOR JEFFREY GEE CHIN, CO-PRODUCER, CO-AUTHOR, AND DIRECTOR OF *Lil Tokyo Reporter*; SIDNEY KANAZAWA OF MCGUIREWOODS LLP, WHO WORKED ON THE PETITION FOR FUJII'S POSTHUMOUS ADMISSION TO THE STATE BAR; SAN FRANCISCO ATTORNEY ADAM ENGELSKIRCHEN, GREAT-GRANDSON OF J. MARION WRIGHT, FUJII'S LAW PARTNER; PASADENA ATTORNEY CORALIE KUPFER, DAUGHTER OF ATTORNEY OWEN KUPFER, WHO WORKED WITH WRIGHT AND FUJII ON THE U.S. SUPREME COURT CASE IN 1928 THAT PERMITTED THE CONSTRUCTION OF THE BOYLE HEIGHTS-BASED JAPANESE HOSPITAL OF LOS ANGELES AND THE OVERTURNING OF THE CALIFORNIA ALIEN LAND LAWS; AND LTHS DIRECTOR CAROLE FUJITA, EXECUTIVE PRODUCER OF *Lil Tokyo Reporter*.

Photo courtesy Little Tokyo Historical Society.



FILMMAKER JEFFREY GEE CHIN, LEFT, AND SCULPTOR MILES ENDO, HOLDING THE FAR END OF VEIL, REVEAL AN 8-FOOT-TALL STEEL LANTERN IN LITTLE TOKYO'S JAPANESE VILLAGE PLAZA. THE MONUMENT IS DEDICATED TO THE JAPANESE-BORN LATE CIVIL RIGHTS ACTIVIST SEI FUJII. (IRFAN KHAN / LOS ANGELES TIMES)

Photo and caption courtesy Los Angeles Times.

monument includes the name of J. Marion Wright as Fujii's colleague and collaborator.¹⁹

The enactment of California's Alien Land Law on May 19, 1913 relegated people of Japanese ancestry to yet another second-class status. Unlike other persons born outside of the United States, Japanese, by law, had no right to "acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein" because they were unique among aliens in that U.S. immigration laws denied the right of "non-white" Asians from becoming U.S. citizens.²⁰

Ironically, the 1918 worldwide Spanish influenza pandemic (which disproportionately devastated the Japanese community due to its lack of

¹⁹ For press coverage of the monument in the wider Los Angeles community, see Martha Groves, *An Activist Remembered: Monument Honors Little-Known Japanese Advocate Sei Fujii*, LOS ANGELES TIMES, August 2, 2015.

²⁰ Aoki, *supra* note 13, at 55–62.

access to non-Japanese hospitals in Southern California) presented the first opportunity to chip away at the Alien Land Law.

In the wake of the 1918 influenza pandemic, a group of Japanese doctors, with the support of the Japanese community, banded together to build a Japanese Hospital. To avoid the prohibitions of the Alien Land Law, the doctors formed a corporation to acquire the land for the hospital. California's secretary of state refused to recognize the corporation because its purpose would violate the restrictions of the Alien Land Law.

Wright and Fujii teamed together to help the doctors and successfully took their case up through the California Supreme Court and U.S. Supreme Court, despite community leaders' predicting a coming war with Japan²¹ and California political campaigns to save "California — the White Man's Paradise" from the "yellow peril."²² In the aftermath of the favorable decision by the U.S. Supreme Court,²³ the Japanese community raised \$100,000 to build the hospital in 1929, just before the stock market crash, and built the hospital despite the Great Depression that followed.²⁴

By law, Fujii could not practice law in California, but he could and did make a difference in how the rule of law was applied, and he affected the Japanese community by the power of his pen.

Although the 1907 "Gentlemen's Agreement" was supposed to stop the immigration of new workers from Japan, some continued to arrive through Canada and Mexico. There were also profiteers. Corrupt immigration officers and opportunistic Japanese informants extorted and exploited the illegal status of these immigrants. Some Japanese newspapers were complicit and refused to expose this illegal activity.

Even without a law license, Fujii could not stand silent in the face of this injustice. He rallied the Japanese community to oppose this

²¹ WALTER R. PITKIN, *MUST WE FIGHT JAPAN?* (1921).

²² *Oyama v. California*, *supra* note 15, at 658–659 (1948) (Murphy, J., concurring opinion); Paul Finkelman, *2015 Mid-Atlantic People of Color Conference: Coping with a New "Yellow Peril": Japanese Immigration, the Gentlemen's Agreement, and the Coming of World War II*, 117 W. VA. L. REV. 1409 (2015).

²³ *Jordan v. Tashiro*, 278 U.S. 123 (1928).

²⁴ Japanese Hospital, located at First & Fickett Streets, also served the Latino, Black, and Jewish communities for many years, and was granted historic designation by the City of Los Angeles on November 1, 2016.

corruption and inhumanity. As documented in the *Los Angeles Times*, over 1,800 Japanese people came to rally with Fujii against the injustice.²⁵ This gathering sparked a major raid but his followers fought back. Despite a \$150,000 defamation lawsuit by an immigration officer,²⁶ Fujii refused to be silent and spoke louder for the Japanese community by founding his newspaper, *Kashu Mainichi*, on November 5, 1931 with the support of Japanese farmers and donors from the Yamaguchi Prefectural Association.

Kashu Mainichi not only spoke for the immigrants being abused by the immigration system, it spoke for farmers being swindled and cheated by organized crime in Little Tokyo, and for young students making positive contributions to the community around them.

Not all appreciated Fujii's voice. On several occasions, organized crime attempted to burn down his office and to assassinate him as well. On November 25, 1932, assassins were nearly successful, leaving Fujii bloodied on the street. Fortunately, the Japanese Hospital had been built by then and it is where he was taken to recover from his gunshot wounds.

During World War II, on February 22, 1942, Fujii was taken to a high-security detention center because of his leadership position at the *Kashu Mainichi*.

Upon his release, Fujii again joined with Wright to confront the Alien Land Law. Despite the reluctance of second-generation Japanese Americans (Nisei) to "rock the boat" in the immediate aftermath of the Allied forces' victory over Japan, Fujii was insistent on filing a lawsuit to directly challenge the Alien Land Law after the U.S. Supreme Court avoided the question of whether the Alien Land Law was constitutional in the case of *Oyama v. California*.²⁷

In 1948, Fujii, still unable to become a U.S. citizen,²⁸ purchased a property on North Record Avenue in East Los Angeles to specifically challenge

²⁵ *Rioters Rout Federal Men: Immigration Officers Flee Japanese Attack*, LOS ANGELES TIMES, November 5, 1931.

²⁶ *Immigration Man Sues on Accusation*, LOS ANGELES TIMES, October 14, 1931.

²⁷ 352 U.S. 633 (1948).

²⁸ *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (holding that the Japan-born appellant "is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side" and is therefore ineligible for citizenship); see also Devon

the law.²⁹ The state used the Alien Land Law to take the property from him by escheatment. Fujii and Wright used this taking to challenge the constitutionality of the Alien Land Law and successfully obtained that result before the California Supreme Court on April 17, 1952. Two years later, with the change in immigration laws, Fujii became a U.S. citizen and died fifty-one days later.

THE CALIFORNIA SUPREME COURT UNANIMOUSLY ADMITS FUJII POSTHUMOUSLY

A petition was filed on January 23, 2017 by the Little Tokyo Historical Society and the Japanese American Bar Association for the posthumous admission of Sei Fujii to the State Bar of California, with the support of 72 bar associations and community leaders (listed at the end of this article). On May 24, 2017, the California Supreme Court issued a unanimous administrative order³⁰ granting honorary posthumous membership in the State Bar of California to Sei Fujii, a Japan-born 1911 USC law graduate who — even without a license to practice law — dedicated his life to using the rule of law to promote justice and dignity for the Japanese community in Southern California, including his service as the plaintiff in *Fujii v. California*.³¹ In granting Fujii's admission to the bar, the court noted, in part:

W. Carbado, *Yellow by Law*, 97 CAL. L. REV. 633 (2009) (for historical and civil rights context of *Ozawa*).

²⁹ David Sloss, *How International Human Rights Transformed the U.S. Constitution*, 38 HUMAN RIGHTS Q. 426 (2016) (discussing facts of *Fujii v. California* and how it used non-discrimination provisions of the United Nations treaty to transform U.S. constitutional law).

³⁰ ADMINISTRATIVE ORDER 2017-05-17, *supra* note 14, at ***1 (Cal. 2017). The petition was filed by McGuireWoods (Kimberly Nakamaru, Arsen Kourinian, Adam Summerfield, Dana Palmer, Leslie Werlin, and Sidney Kanazawa). Much of this generous outpouring of support for the petition was initiated by the enthusiastic volunteer efforts of Fumiko Carole Fujita (Little Tokyo Historical Society), Mark Furuya (assistant general counsel, Clark Construction Group, LLC; president, Japanese American Bar Association), Doris Cheng (partner, Walkup, Melodia, Kelly & Shoenberger), Robert Meneses (administrative deputy, Los Angeles County Office of Alternate Public Defender), and Michael Wu (general counsel, Carters, Inc.) over the holidays just before the filing of the petition.

³¹ 38 Cal.2d 718 (1952).

Though Fujii both graduated from law school and made his career in California, throughout his entire professional life he was barred from obtaining a license to practice law in the state. This was an injustice that we repudiate today by granting Fujii honorary posthumous membership in the State Bar of California. . . .

Despite being formally excluded from joining the ranks of the legal profession throughout his life, Fujii spent much of his career using the courts to advance the rule of law in California. . . . Fujii's work in the face of prejudice and oppression embodies the highest traditions of those who work to make our society more just.³²

The referenced “prejudice and oppression” are amply reflected in the *Fujii v. California* dissent. The dissent begins at a logical place:

There is no question as to what the law is. It was enacted in the year 1920 by the people of California through the initiative [citation omitted]; it is based, as to the classification established, on an act of the Congress of the United States [footnote deleted]; for the past 32 years this law . . . has been consistently upheld by this court and by the Supreme Court of the United States as against the precise attack now made on it. But now, say the majority, upon an elaborate analysis of the trend of recent decisions of the Supreme Court of the United States, they think that that court, if the question were to be again presented to it might or would change its holding. The most careful study of the majority opinion discloses no other legal basis for their holding than this conjecture.³³

But then the dissent seems oblivious to its own unfounded bias toward an entire class of persons and the odiousness of that generalized classification to our constitutional principles requiring “probable cause” rather than assumptions of guilt:

[I]t can hardly be seriously doubted that use or ownership of land by persons ineligible to citizenship may reasonably be determined by the people of a state to constitute a threat to the safety or welfare of the state because such ineligible persons cannot be bound

³² ADMINISTRATIVE ORDER 2017-05-17, *supra* note 14, at ***2, ***6–***7.

³³ *Fujii v. California*, *supra* note 1, at 753 (Schauer, J., dissenting and concurring).

by an oath of allegiance to the United States, of which each state is an inseparable part, and, as a class their loyalty to and interest in the state are suspect, and further, such ownership of the land by its citizens, or those who can become such, bears a vital relationship to the strength of a free country. . . . The ownership of the soil by persons morally bound by obligations of citizenship is vital to the political existence of the state. It directly affects its welfare and safety. . . . The question is not whether every individual ineligible alien may be said to be disloyal to this nation, but whether the loyalty of such ineligible aliens *as a class* [italics in original] may be doubted. [Footnote 7: As is pointed out by Walter Pitkin in his “Must We Fight Japan?” (1921, The Century Co., p. 440), “The loyalty of the Japanese to his Government stands above all else. That is his religion.”] It is not within the province of this court, especially in the light of history which need go no further back than December 7, 1941, to declare that such doubt is unreasonable and bears no substantial relationship to the public welfare.³⁴

Incredibly, the dissent justifies the Alien Land Law’s overt discrimination against Japanese based on stereotypes and fears, rather than any rational basis for different rules of law for aliens from Japan and aliens from non-Japanese countries. The dissent found arguments in pamphlets supporting the anti-competitive purpose of the Alien Land Law to be rational and justified. The pamphlet stated: “[The Alien Land Law’s] primary purpose is to prohibit Orientals who cannot become American citizens from controlling our rich agricultural lands . . . Orientals, and more particularly Japanese, [have] commenced to secure control of agricultural lands in California.” The dissent further justifies the law on the basis of the threat posed by Japanese farmers who work fourteen to eighteen hours a day (as compared with non-Oriental American farmers who take Sundays off and work only ten to twelve hours a day) and have built a growing market dominance because of their efforts — e.g., producing 80% of the tomato crop and 80–100% of the spinach crop in the state and becoming a significant proportion of the growers of various crops:

³⁴ *Id.* at 766–767 (Schauer, J., dissenting and concurring).

berries (88%), sugar beets (67%), grapes (52%), vegetables (46%), citrus fruits (39%), and deciduous fruits (36%).³⁵

Chief Justice Phil Gibson's majority opinion in *Fujii v. California* first analyzed whether the human rights and equal protection provisions of the United Nations Charter could be the basis for overturning the Alien Land Law. While acknowledging that its "humane and enlightened objectives" are "entitled to respectful consideration by the courts and legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities" and that "[t]he charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs," the majority concluded that the charter was not "self-executing" and cannot "operate to invalidate the Alien Land Law."³⁶

The court then considered the Fourteenth Amendment's Due Process and Equal Protection Clauses in the face of U.S. Supreme Court precedents upholding the law and more recent precedents suggesting that the Alien Land Law was unconstitutional:

The clear import of the statements quoted above from the *Korematsu*, *Oyama* and *Perez* cases is that the presumption of validity is greatly narrowed in scope, if not entirely dispelled, whenever it is shown, as here, that legislation actually discriminates against certain persons because of their race or nationality. This view, now established by the latest declarations of the United States Supreme Court, is irreconcilable with the approach previously taken by that court in the *Porterfield* case in determining whether there was a reasonable relation between the purposes sought to be accomplished, and the classification adopted, in the California Alien Land Law.³⁷

The majority found that

[t]he only disqualification urged against Sei Fujii is that of race. . . .
"Nothing in this record indicates, and we cannot assume, that

³⁵ *Id.* at 767 n.8, 768 n.10 (Schauer, J., dissenting and concurring).

³⁶ *Id.* at 720–725.

³⁷ *Id.* at 730–731.

he came to America for any purpose different from that which prompted millions of others to seek our shores — a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them.”³⁸ [Internal quotes and citations deleted.]

The court noted, “Shortly after the statute was enacted this court recognized that the legislation was directed at the Japanese and that its purpose was to discourage them from coming into this state [citation omitted]. Moreover, the state has enforced the law solely against persons ineligible to citizenship because of race and primarily against Japanese [citing statistics presented in *Oyama v. California*].”³⁹

The court then concluded:

In the light of the foregoing discussion, we have concluded that the constitutional theories upon which the *Porterfield* case was based are today without support and must be abandoned. The California Alien Land Law is obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis. There is nothing to indicate that those alien residents who are racially ineligible for citizenship possess characteristics which are dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals, safety or welfare. Accordingly, we hold that the alien land law [sic] is invalid as in violation of the Fourteenth Amendment.⁴⁰

The concurring opinion by Justice Jesse Carter was even more forceful: “It is clear, therefore, that there is not now and never has been any rational basis for excluding the Japanese from land ownership.”⁴¹ The ineligibility of Japanese for U.S. citizenship has no relation to the interests and welfare of the state. “It would take a high degree of judicial

³⁸ *Id.* at 733–734.

³⁹ *Id.* at 735 (quoting *Ex parte Kawato*, 317 U.S. 69, 71 (1942)); *Oyama v. California*, *supra* note 15, at 661–662 (Murphy, J., concurring).

⁴⁰ *Id.* at 737–738.

⁴¹ *Id.* at 742 (Carter, J., concurring).

deference to local judgment to believe that Japanese were the worst offenders in nonproductivity.’⁴² Justice Carter quoted, as well, from Carey McWilliams:

“It was George Shima, an immigrant, who taught the Californians how to develop a good potato seed. It was Japanese farmers who developed berry production in the West by increasing the yield four or five times over what it had been It was the Japanese who took over the semi-abandoned community of Livingston and made it a profitable farming area”⁴³

The concurring opinion also noted the Japanese contribution to the defense of the country during World War II and chided the dissent for wanting to deny rights to the widowed mother of a Congressional Medal of Honor recipient.⁴⁴ “The Japanese . . . have probably contributed more to America than any other Asiatics. Their sons formed the famous 442nd Regimental Combat Team, which probably received more decorations and suffered more casualties than any unit of similar size in the entire U.S. Army.”⁴⁵ The concurring opinion also noted, “These antiquated statutes [i.e., the Alien Land Law and immigration statutes focused on race] give the Communists in the Far East a powerful anti-American propaganda weapon, and damage our relations with the people of Asia.”⁴⁶

STORY OF COURAGE

If nothing else, the California Supreme Court’s recognition of Sei Fujii with an honorary posthumous admission to the State Bar of California reminds us of what President John F. Kennedy called “that most admirable of human virtues — courage” in his book *Profiles in Courage*

⁴² *Id.* at 747 (Carter, J., concurring) (quoting Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 39 (1947)).

⁴³ *Id.* (quoting CAREY MCWILLIAMS, PREJUDICE: JAPANESE-AMERICANS: SYMBOL OF RACIAL INTOLERANCE 79 (1944)).

⁴⁴ *Id.* at 748 (Carter, J., concurring) (quoting an unnamed article by Blake Clark in THE FREEMAN, July 16, 1951).

⁴⁵ *Id.* at 749 (Carter, J., concurring) (quoting Clark).

⁴⁶ *Id.* at 748 (Carter, J., concurring) (quoting Clark).

published one year after Fujii's death. It took courage for Fujii to come to the United States, attend USC law school, and study law in the face of laws preventing his U.S. citizenship and admission to the bar. It took courage for Fujii to fight for justice and dignity for the Japanese community against criminal elements within the Japanese community and against the larger non-Japanese community with the training, but not the license, to practice law. It took courage for J. Marion Wright to partner with Fujii to defend the Japanese community in the face of overwhelming anti-Japanese sentiment throughout California before, during, and after World War II. It took courage for the California Supreme Court to strike down the Alien Land Law, seven years after the end of the war with Japan, in the face of a U.S. Supreme Court precedent upholding the same law only thirty years earlier, and to justify this nullification of popular legislation by highlighting the achievements and sacrifices of the Japanese community in proving their loyalty to a country that had treated them like untrustworthy "others" because they looked like a wartime "enemy." And it took courage for the current California Supreme Court to decide to retell this story in this divisive period of polarized politics.

Fujii's story reminds us that now, more than ever, we need the same courage that Fujii and Wright mustered to stand up for "others." To step outside of our political and internet echo-chamber silos. To listen. To empathize. To champion the rights and dignities of those who may not be like us but who deserve the same justice, fairness, and kindness that we expect for ourselves.⁴⁷ To



PHOTO OF SEI
FUJII FROM THE
USC SCHOOL OF
LAW CLASS OF 1911
ALBUM.

⁴⁷ Sabrina Tavernise, *The Two Americans*, NEW YORK TIMES, August 26, 2017; Michael Barbaro, "The Daily": *Two Lives Collide in Western Arkansas*, NEW YORK TIMES, THE DAILY PODCAST (August 30, 2017) (an audio version of Sabrina Tavernise's moving story about vandalism and kindness involving two Americans, Abraham Davis and Hisham Yasin, and a Muslim mosque in Fort Smith, Ark.).



SUPPORTERS OF THE PETITION FOR SEI FUJII'S POSTHUMOUS
ADMISSION TO THE STATE BAR

(FRONT ROW, L.-R.) YUKIO KAWARATANI, ASSOCIATE PRODUCER OF *LIL TOKYO REPORTER* AND RETIRED SENIOR LOS ANGELES CITY PLANNER; MIKE OKAMURA, PRESIDENT, LITTLE TOKYO HISTORICAL SOCIETY (LTHS); ATTORNEY KIM NAKAMARU, GLOBAL EAGLE ENTERTAINMENT (FORMERLY OF MCGUIREWOODS LLP); LTHS DIRECTOR CAROLE FUJITA, EXECUTIVE PRODUCER OF *LIL TOKYO REPORTER*; PASADENA ATTORNEY CORALIE KUPFER; (MIDDLE ROW, L.-R.) GEORGE SHAW, COMPOSER OF MUSICAL SCORE FOR *LIL TOKYO REPORTER*; LTHS VOLUNTEER TADASHI KOWTA; ATTORNEY ARSEN KOURINIAN, MCGUIREWOODS LLP; LTHS DIRECTOR JEFFREY GEE CHIN, CO-PRODUCER, CO-AUTHOR, AND DIRECTOR OF *LIL TOKYO REPORTER*; LINDSEY SUGIMOTO, JD CANDIDATE, UC BERKELEY SCHOOL OF LAW; (BACK ROW, L.-R.) ATTORNEY SIDNEY KANAZAWA, MCGUIREWOODS LLP; SAN FRANCISCO ATTORNEY ADAM ENGELSKIRCHEN.

Photo courtesy Little Tokyo Historical Society.

act as attorneys.⁴⁸ And in the end, we may find — just as Fujii, Wright, and the California Supreme Court found — that we are more alike than different and that, in “the land of the free and the home of the brave,” we need the courage to trust and respect each other as fellow citizens, rather than fear each other as enemies in a land of the mean and a home of the scared.

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⁴⁸ Sidney K. Kanazawa, *Erase the Lines . . . We're All in This Together*, in ILLP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 93, 99 (2017) (“Our oath of office is not simply a license to earn money in the business of law. By pledging to uphold the constitution and the rule of law, we joined a profession dedicated to keeping our society together by reminding our fellow citizens of values and principles we hold in common.”).

LIST OF SUPPORTERS — in response to the petition by the Little Tokyo Historical Society and the Japanese American Bar Association for the posthumous admission of Sei Fujii to the State Bar of California, filed by McGuireWoods (Kimberly Nakamaru, Arsen Kourinian, Adam Summerfield, Dana Palmer, Leslie Werlin, and Sidney Kanazawa) on January 23, 2017:

INDIVIDUALS

Jeff Adachi, Public Defender of the City and County of San Francisco

Mike Feuer, Los Angeles City Attorney

B. Mark Fong, Partner, Minami Tamaki LLP

Janice Y. Fukai, Los Angeles County Alternate Public Defender

Janice K. Hahn, Los Angeles County Supervisor for the Fourth District

Michael E. Meyer, Chairman, Los Angeles Offices, DLA Piper LLP;

President-Elect, Los Angeles County Bar Association

Dale Minami, Partner, Minami Tamaki LLP

Al Muratsuchi, Assemblymember, 66th California State Assembly District

Aviam Soifer, Dean, University of Hawaii Richardson School of Law

Hilda L. Solis, Los Angeles County Supervisor for the First District

Donald K. Tamaki, Partner, Minami Tamaki LLP

Eric K. Yamamoto, Fred T. Korematsu Professor of Law and Social Jus-

tice, University of Hawaii Richardson School of Law

ORGANIZATIONS

American College of Trial Lawyers

Arizona Asian American Bar Association

Asian Americans Advancing Justice — Asian Law Caucus, Asian American Bar Association of Chicago

Asian American Bar Association of Houston

Asian American Bar Association of New York

Asian American Legal Foundation, Asian Americans Advancing Justice — Los Angeles

Asian Law Alliance

Asian Pacific American Bar Association

Asian Pacific American Bar Association of Central Ohio

Asian Pacific American Bar Association of Maryland

Asian Pacific American Bar Association of Pennsylvania

Asian Pacific American Women Lawyers Alliance

Association of Corporate Counsel (ACC); ACC Sacramento Chapter, ACC
San Francisco Bay Area Chapter, ACC Southern California Chapter
Chinese for Affirmative Action
Civil Rights Education and Enforcement Center
Connecticut Asian Pacific American Bar Association
Dallas Asian American Bar Association
Equal Rights Advocates
Filipino American Lawyers Association of Chicago
Georgia Asian Pacific American Bar Association
Go For Broke National Education Center
Greater Orlando Asian American Bar Association
Historic Wintersburg, Huntington Beach, California
Institute for Inclusion in the Legal Profession
Italian American Bar Association of Northern California
Japanese American Bar Association
Japanese American Citizens League
Japanese American Cultural & Community Center
Japanese American National Museum
Korean American Bar Association of Georgia
Korean American Bar Association of Southern California
Korean American Lawyers Association of Greater New York
Little Tokyo Historical Society
Little Tokyo Service Center
Los Angeles County Asian American Employees Association
Los Angeles County Board of Supervisors
Minnesota Asian Pacific American Bar Association
Missouri Asian American Bar Association
National Asian Pacific American Bar Association
National Asian Pacific Islander Prosecutors Association
National Bar Association
National Conference of Vietnamese American Attorneys
National Filipino American Lawyers Association
Orange County Asian American Bar Association
Oregon Asian Pacific American Bar Association
Philippine American Bar Association
San Francisco Chapter of the American Board of Trial Advocates

San Francisco Trial Lawyers Association
South Asian Bar Association of Southern California
Taiwanese American Lawyers Association
Thai American Bar Association
The Bar Association of San Francisco
The California Chapters of the American Board of Trial Advocates
Tuna Canyon Detention Station
USC Gould School of Law

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CALIFORNIA — LABORATORY OF LEGAL INNOVATION

HARRY N. SCHEIBER*

EDITOR'S NOTE

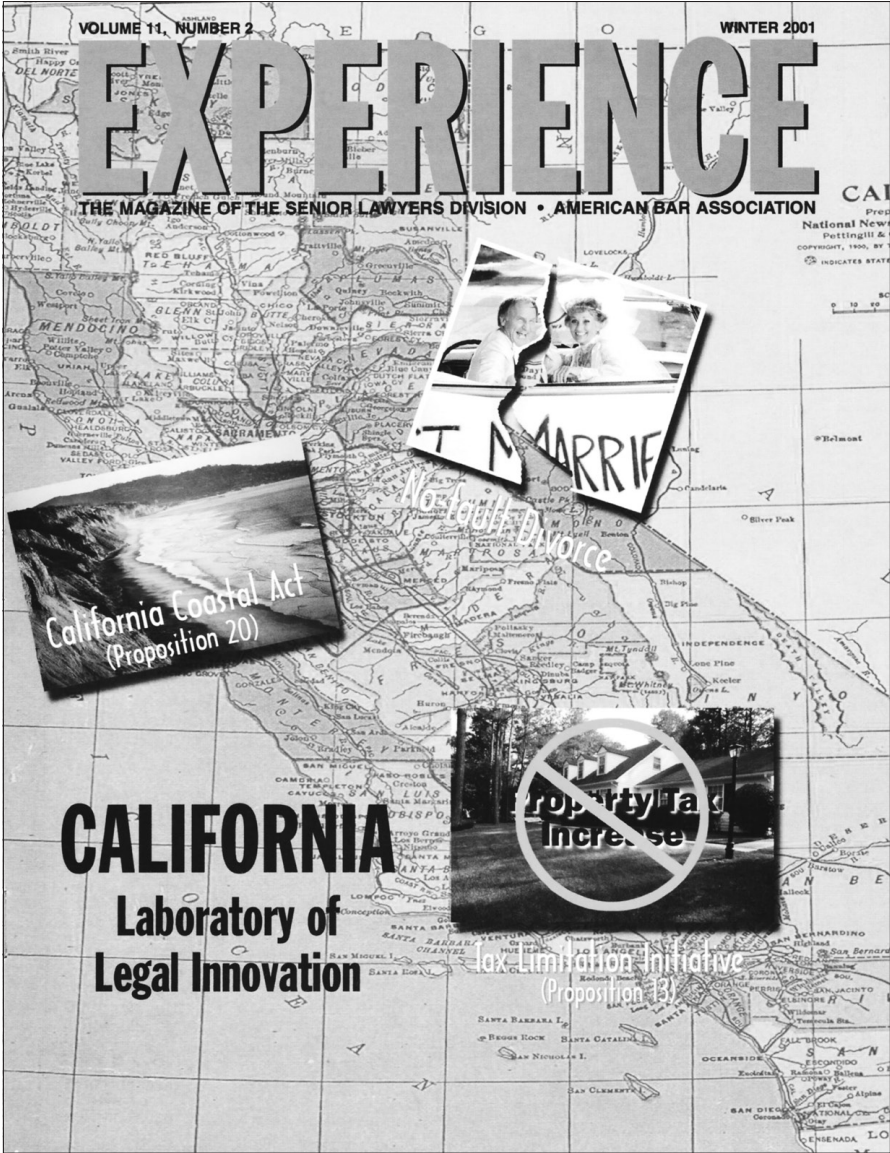
The following article first appeared in the ABA magazine *Experience* in 2001.¹ As chair of the *Experience* Editorial Board at the time, I had invited Harry Scheiber to prepare an article on the theme of California as a leading legal innovator. Later that year, he obtained permission from the ABA to republish the article in the *Yearbook* of the California Supreme Court Historical Society (the predecessor of *California Legal History*), but he did not do so by reason of a pause in publishing during the transition from the *Yearbook* to this journal, both of which he served as founding editor.

Subsequently, when I proposed the same topic for the Society's annual program at the 2006 State Bar Annual Meeting in Monterey, Professor Scheiber was scheduled to present this research,² but emergency oral

* Stefan A. Riesenfeld Professor of Law (Emeritus) and Chancellor's Emeritus Professor, University of California, Berkeley, and Director of the Institute for Legal Research.

¹ 11 EXPERIENCE 4 (2001).

² The other speakers were Kathryn Mickle Werdegar, Associate Justice, California Supreme Court; Jake Dear, Chief Supervising Attorney, California Supreme Court;



Joseph R. Grodin, former Associate Justice, California Supreme Court and Distinguished Professor Emeritus, UC Hastings College of the Law; Robert F. Williams, Distinguished Professor of Law, and Associate Director, Center for State Constitutional Studies, Rutgers University School of Law, Camden; and Gerald K. Uelmen Professor of Law (and former Dean), Santa Clara University School of Law (who substituted for Professor Scheiber). The moderator was former (and again, 2015–) Court of Appeal Justice Elwood Lui, then partner at Jones Day.

surgery prevented his appearance. Excerpts of the other panelists' remarks were published in the Society's *Newsletter*,³ but neither Professor Scheiber's spoken nor written words reached their intended California audience. With the present volume of *California Legal History*, his ideas find their home in the Society's publications.

Professor Scheiber's historical overview is confirmed by the passage of time — as is his prescience regarding innovations to come. Although such a work might be updated over time to include later developments, it must ultimately become a historical document that speaks from the perspective of a given moment. In that spirit, it is presented here without revision, as it first appeared, but with the addition of citations and notes.

— SELMA MOIDEL SMITH

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CALIFORNIA — LABORATORY OF LEGAL INNOVATION

The great social critic and journalist Carey McWilliams famously termed California “the great exception,”⁴ asserting that the geographic conditions, cultural mix, economic structure, and social milieu of the Golden State made it unique even in a nation rich in diversity and contrasts. It might be a bit misleading to speak of California law as “exceptional,” because in our federal system every state government can be, if it so wishes, a “laboratory” (as Justice Brandeis said⁵) of policy experiments and legal innovation. In an earlier day, before the national government assumed its modern form with such large boundaries of authority, there was even greater room than now for states to compete for the crowning title of “the great exception.” And California has risen boldly to the challenge, both in modern times and earlier days.

Even in the state's first constitutional convention, held in Monterey in 1849, one delegate denounced the tendency shown by some toward

³ Autumn/Winter 2006, Special Supplement, available at <https://www.cschs.org/wp-content/uploads/2014/08/2006-Newsletter-Fall-Monterey-Supplement-updated.pdf>.

⁴ CAREY McWILLIAMS, *CALIFORNIA: THE GREAT EXCEPTION* (1949).

⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

“servilely” copying the constitutions of other states. This convention was capable of originality, he shouted, and it would be shameful to permit a California constitution to be merely composed of borrowed legal “shreds and patches” (quoted from *Hamlet*).⁶ This kind of thinking has had a continuing vitality in the life of the law, as in other respects, in the Golden State’s history.

When California law has been different, moreover, it has often been the bellwether of legal change nationally. Probably every one of the fifty states can point to a few areas of law in which it developed new doctrine accepted by other states. But California has a record, probably unique in the number and subject-matter range, of legal innovations — instituted by the Legislature and the courts alike — that have broken new paths. The degree to which other states have followed California’s lead has been dramatically manifested in some vitally important aspects of private law, such as the field of torts. In modern constitutional law, too, the California Supreme Court has often interpreted fundamental law with positions that the Supreme Court of the United States would eventually adopt.

In the spirit of innovation, the new state’s legislature placed on its agenda various proposals for codification of the laws even before California was admitted formally to the Union. The playbook for codification had been written earlier by the noted legal reformer David Dudley Field in New York State. But Western states were the ones that ran with the ball. The purpose was to demystify and clarify the law for a republican citizen, supplanting both substantive vagaries and the Byzantine procedural complexities of the common law system. The debate went on in California throughout the two decades after statehood was achieved, climaxing after 1863, when Governor Leland Stanford called for “thorough revision and codification.”⁷ California lawyers and historians are generally pleased to report that not only did the Legislature finally respond by approving a series of codification commissions in the 1860s, but it also outran New York to the goal line by adopting civil, penal, and political codes in 1872. The process was not

⁶ J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER 1949 51 (1850).

⁷ ANNUAL MESSAGE OF LELAND STANFORD, GOVERNOR OF THE STATE OF CALIFORNIA, AT THE FOURTEENTH SESSION OF THE LEGISLATURE 8 (January 1863).

complete, and clarification continued throughout the following century through both judicial and legislative action; but California's adoption of Field's code was an example followed by a growing number of states.

FAMILY LAW

Among the modern landmarks of legal innovation in California, perhaps none is more widely known than the adoption of no-fault divorce under California's Family Law Act of 1970. This was followed by a series of decisions by the California Supreme Court, and also additional statutes on family law, that provided for basic reforms in the rules of child custody, child support, and domestic partnership. In 1976, the attention of a national public was riveted on the adjudication of the famous 1976 case of *Marvin v. Marvin*,⁸ when the California Supreme Court ruled that oral agreements of an unwed couple would be enforceable under common law principles of contract. The court followed with a string of decisions in the 1980s extending constitutional protection to the right to choose a life partner (unmarried but living together as a couple), giving unmarried couples protection against discrimination in employment and in the economic marketplace more generally, and banning discrimination against gays and lesbians in adoption law. Colorado, Vermont, and Hawaii have gathered all the headlines in this area of legal innovation in recent days, but their controversial moves in the field of family law and homosexual rights have their beginnings out on the West Coast, in the familiar legal territory that is California's seedbed of new law. One cannot add community property law to the list, however, despite its renown as a California institution, because it was not a California innovation but rather an adoption of Texas law.

THE ENVIRONMENT

Environmental law and policy is another area in which California has been the bellwether nationally. In coastal zone and offshore environmental protection, California was far out in front, not because of action by the courts or the Legislature but because of a popular initiative in 1972, "Prop. 20," which was unique for the time in providing new doctrines

⁸ 18 Cal.3d 660.

and legal instruments for coastal zone management. In its essential elements, this product of the direct ballot in California would be a model for the provisions of the national Coastal Zone Act adopted by Congress three years later.

In the movement for the more comprehensive regulation of environmental issues, the national government led the way in the 1970s during the Nixon administration. But California's legislature followed suit quickly [with the California Environmental Quality Act of 1970 — "CEQA"], and it was not long before the California judiciary came down with a series of decisions that dealt boldly with some of the hottest issues of unfinished business left to the courts by the legislative process. The California courts made agency compliance subject to judicial scrutiny, fashioned standing doctrines that expedited challenges to both private and governmental action by public interest groups and others, and interpreted broadly the requirements for environmental impact statements. The California court also took a strong position on "public trust" principles in regulatory law and the environment, in this instance referring to the state's heritage of Spanish and Mexican civil law concepts. These judicial rulings were closely watched and taken widely as precedent by other state courts that were sympathetic to the requirements of an effective system of environmental protection. As a broadly noticed scholarly commentary asserted in 1980, the California judiciary had placed itself "on the cutting edge of preservationism" nationally.

CONSTITUTIONAL LAW

Judicial action on environmental law in California was matched in its influence during the 1970s by the prominence of the state supreme court's constitutional decisions. To cite one especially important case, *Serrano v. Priest*,⁹ the state high court ruled in 1976 that education was a fundamental right, and that the state's local property tax structure for support of schools violated the equal protection guarantee. Finding wide disparities in levels of local support produced by the tax, the court required the Legislature to devise a new system that would provide more nearly equal school

⁹ 18 Cal.3d 728.

financing — pointing the way to similar decisions in other states, including most recently, for example, the widely noticed actions in this area of law taken by the Ohio Supreme Court.

The *Serrano* decision was one of a larger body of rulings by the California court that the justices based on the state's own constitution rather than the federal constitution. At that time and earlier, it was common for the state courts to resist "liberal" doctrines that the U.S. Supreme Court had applied to the federal government itself. (The California court itself resisted applying the federal exclusionary rule in state trials, for example, declaring in a 1942 decision that the Fourth Amendment did not apply to the states, and despite similar language on search and seizure in the federal and California constitutions, "California is free to interpret its own constitution" on such matters.¹⁰) In *Serrano* and other cases in the 1970s, however, the California court introduced its own "liberal" interpretations of state constitutional language, going beyond what the increasingly conservative U.S. Supreme Court was interpreting as the requirements of similar or identical language in the federal document. Thus, the *Serrano* court declared that the equal protection provisions of California's constitution "are possessed of an independent vitality Accordingly, decisions of the U.S. Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law."¹¹ Hence the California court chose not to apply a contrary finding on equal school financing that a year earlier had been handed down by the federal Supreme Court in *San Antonio School District v. Rodriguez*.¹²

Application by the high courts in many states of this doctrine of "independent and adequate state grounds" became a prominent feature of the landscape in American law in the 1970s. It was a development largely driven by decisions of the high courts in three or four states in that period, but preeminently so by California's Supreme Court. One of the most respected and influential expositors of the state grounds doctrine, both in scholarly forums and in decisions of the California court, was Associate

¹⁰ *People v. Gonzales*, 20 Cal.2d 165, 169.

¹¹ *People v. Longwill*, 14 Cal.3d 943, 951 n.4 (1975).

¹² 411 U.S. 1 (1973).

Justice Stanley Mosk (who has subsequently gone on to establish a record for longevity of service on the court). Discriminatory zoning, separation of church and state, leafleting in shopping centers, search and seizure rules, right to counsel, the right of privacy, the death penalty, and a host of other questions were decided on state grounds by the California high court in the 1970s, as the increasingly conservative national Supreme Court retreated from Warren Court premises and doctrines or else declined to break new legal ground in such areas.

Meanwhile, the California court was also pioneering in tort law, leading in the dramatic “tort revolution” that brought industrial liability to its dominant position nationally. Roger B. Traynor, who served on the court from 1940 to 1970, and was chief justice from 1964 to 1970, was the chief judicial architect of this important court-fashioned legal reform. Traynor also wrote opinions for the California court in a number of constitutional areas where the U.S. Supreme Court would eventually follow suit, for example, in striking down the state’s antimiscegenation statute¹³ some two decades before the federal high court adopted Traynor’s reasoning and acted similarly against such laws in *Loving v. Virginia*.¹⁴ In decisions interpreting the federal and state constitutions on the subjects of search and seizure, discovery rights in criminal cases, and discrimination in jury selection, the California court’s rulings were mirrored years later in the U.S. Supreme Court’s decisions.

CALIFORNIA DEMOCRACY

California also has won a name, admirably or otherwise, as the fountainhead of the “tax revolt” that has had such sweeping consequences for state government and the provision of social services and education in many states. The revolt began with the Golden State’s Proposition 13, adopted in 1978. Within only five years’ time, adaptations of the new tax-limitation law in California had been put on the ballot in sixteen other states. It is the process, and not only the message, in which California has been exceptional. There is no question that recent trends in the political process nationally have constituted a true “Ballot Initiative Revolution,” and again

¹³ *Perez v. Sharp*, 32 Cal.2d 711 (1948).

¹⁴ 388 U.S. 1 (1967).

California was the seedbed. Insofar as the state courts have been involved in this revolution, of the cases challenging procedural and constitutional aspects of direct ballot initiatives, according to one study, nearly 60 percent nationally were before the California Supreme Court.

What makes the initiative process all the more interesting, in California and in some other states with active direct-ballot process, is the very great diversity of subjects brought forward by this process for voter decision. In California, there have been what political scientists call “rights-enhancing” measures, such as a constitutional provision introducing a right of privacy, or, indeed, another that amended the Constitution to assert positively the doctrine of independent and adequate state grounds. Ironically, however, in subsequent years some of the most important California initiatives, both statutory and constitutional, have been “rights-reducing,” designed to reverse decisions of the California Supreme Court that extended to criminal defendants procedural rights that went beyond what decisions of the U.S. Supreme Court required of the state. So California’s unique style of legal innovation first drew upon a tradition of independent state law proclaimed by the courts, and then spawned a populist movement for direct voter action, repudiating some of the most important judicial products of that tradition. It is impossible, in light of this very mixed record in use of the direct ballot, to term the California electorate consistently liberal, conservative, or otherwise; perhaps “ornery” is the term that best describes it.

Nor has the record of participatory democracy been consistent in California’s distant past. When a second constitutional convention was held in 1879, the delegates came down hard on corporations and their immunities; the result contained some extraordinary “liberty-enhancing” provisions such as one protecting women from discrimination in pursuit of “any lawful business, vocation, or profession.” (This ostensibly unambiguous language was interpreted by the state’s high court, however, in ways that whittled away at its strength; and the provision was practically dormant until, in 1971, a unanimous decision of the California high court, *Sail’er Inn v. Kirby*,¹⁵ put a strong new interpretation on that provision and buttressed it by declaring gender discrimination a suspect classification under

¹⁵ 5 Cal.3d 1.

equal protection analysis.) But the 1879 Constitution also was accepted enthusiastically by the electorate because it included harsh restrictions on employment and civil rights for Chinese residents that amounted to some of the most blatant and vicious types of discrimination that ever disgraced the law books of an American state outside the slavery region of the Old South. All of the most prominent of these discriminatory articles in the 1879 document were subsequently struck down by federal appellate judges, including some of the leading cases of the U.S. Supreme Court in the 1880s.

Constitution writers, legislators, and judges in every state draw upon the law of other states in shaping their own legal rules and procedures. There is credit (and blame) enough to be widely distributed in this regard. But whether one considers questions of constitutional doctrine, procedure, private law, or lawmaking process, California stands out as a fascinating example of the extraordinary opportunity afforded by the structure and rules of the American federal system for a state to be a “laboratory of legal innovation.”

★ ★ ★

Criminal Law Principles in California:

BALANCING A “RIGHT TO BE FORGOTTEN” WITH A RIGHT TO REMEMBER

MITCHELL KEITER*

In the early 1970s, both the California Supreme Court and Germany’s Federal Constitutional Court faced the same legal question. Marvin Briscoe had hijacked a truck in 1956 and sued *Reader’s Digest* for publishing an account of the event a decade later.¹ An unnamed petitioner likewise had participated in a terrorist act that killed several people and sued to enjoin a German television station from identifying him in a documentary about the event, scheduled to air around the time of his prison release.² Both the magazine and station asserted a right to disclose the truthful information, but both courts ruled against them, concluding disclosure could impede the offender’s rehabilitation and reintegration into society.

Both California and Europe recently have developed new rules about how to balance the public’s right to truthful information with an

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¹ *Briscoe v. Reader’s Digest Association, Inc.*, 4 Cal.3d 529 (1971).

² *Lebach* case, 35 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 202 (1973).

individual's right to suppress embarrassing information about his past. Notwithstanding the prior convergence, the new frameworks are very different, and illuminate the competing philosophical priorities of American and European law. These competing priorities are worth studying, as both the United States and Europe are seeking to apply their model throughout a global internet lacking physical borders,³ and the post-Brexit United Kingdom has the opportunity to consider both the American and Continental models on free speech, privacy, criminal justice, and many other issues as it charts its own legal course in the coming years.

California's policy follows the common law tradition limiting minors' rights to "secure them from hurting themselves by their own improvident acts."⁴ Family Code section 6710 shields minors from the consequences of their "improvidence" and "indiscretions" by permitting them to disaffirm their contracts,⁵ and California's new "Eraser Law," developed legislatively, adapts this principle for the Internet Age by letting minors delete content they regretted having posted on the internet.⁶

Europe's "right to be forgotten" is narrower in one respect but broader in others. Whereas California's law allows the poster unilaterally to remove content, Europe's law, developed judicially by the Court of Justice for the European Union (CJEU), requires someone seeking to remove embarrassing data to show they were "inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary," and the final decision lies with a court.⁷ But Europe's right has a broader reach. California's law

³ Leslie E. Minora, *U.S. Courts Should Not Let Europe's "Right to be Forgotten" Force the World to Forget*, 80 TEMP. L. REV. 609, 616, 619 (2017).

⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *464–65, quoted in *J.D.B. v. North Carolina*, 564 U.S. 261, 273 (2011).

⁵ CAL. FAM. CODE, § 6710; *Burnand v. Irigoyen*, 30 Cal.2d 861, 866 (1947); *Pearson v. Superior Court*, 202 Cal. App. 4th 1333, 1339 (2012).

⁶ CAL. BUS. & PROF. CODE, § 22581, subd. (a). The law took effect in 2015.

⁷ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317 (*Google Spain*). Mario Costeja Gonzalez brought suit upon discovering that internet searches of his name disclosed 1998 newspaper articles describing an auction of his property due to unpaid debts. The EUCJ held Gonzalez' fundamental right "to be 'forgotten' after a certain time" would override both the search engine's "economic interest" in presenting and "the interest of the general public in having access to that information." *Id.*

allows individuals to delete only their own posted content, and not any re-posting of that same content by anyone else. By contrast, the European right permits far more: deletion of (1) one’s own content; (2) another party’s re-posting; and (3) anyone else’s comment or description *about* the original subject (e.g., news reports).⁸ And most obviously, the California law reaches only minors. The CJEU imposed no such limit, implicitly concluding that the indiscretion of youth should not be wasted on the young.

Whereas Germany’s 1973 decision has shaped European law,⁹ the California Supreme Court disapproved its *Briscoe* decision in 2004.¹⁰ The Court naturally cited intervening United States Supreme Court decisions analyzing the First Amendment. But other developments in California criminal law presaged this divergence. In a case arising out of Los Angeles Superior Court, the U.S. Supreme Court in *Farett v. California* (1975)¹¹ recognized a constitutional right to represent oneself in court, a right not protected by European Union law. The Court would later indicate how the self-representation issue pits the individual’s right to be “master of one’s fate” against the possibility of personal embarrassment, and Part I of this article shows how this contrast reflects the respective priorities of Americans and Europeans on privacy law.

Europe’s “right to be forgotten” derives from the French principle letting a convict, after completing his sentence, suppress disclosure of his crime and incarceration,¹² so differences in American and European criminal law naturally offer insight into the disparate conceptions of the law’s reach. Part II of this article recalls California’s 1977 shift from rehabilitation-based indeterminate sentencing to retribution-based determinate sentencing, and its effect on the right of former criminals to hide information about their past. Part III describes a 1982 voter initiative that revised California law to offer juries more information about defendants’ criminal records for the purpose of evaluating their credibility. Part IV

⁸ Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 68 (2012).

⁹ See, e.g., James Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151, 1195 (2004) (*Two Western Cultures*); JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 92, 142 (2003) (*HARSH JUSTICE*).

¹⁰ *Gates v. Discovery Commc’ns, Inc.*, 34 Cal.4th 679 (2004).

¹¹ 422 U.S. 806.

¹² Rosen, *supra* note 8.

shows how the First Amendment provides Americans with far greater speech protections than European law, which restricts speech more to accommodate other values.¹³ Part V offers a theory on why the two legal systems have developed such different legal priorities, and Part VI concludes by summarizing the competing principles.

I. PRIVACY

Continental Europe's inquisitorial system of criminal procedure empowers the state to protect the interests of its people, whereas the adversarial system governing Anglo-American criminal procedure generally trusts citizens to define and defend their own interests.¹⁴ The CJEU judges' empowering courts to determine when to delete internet content, and Californians' empowering users themselves to do so, reflects this general contrast. Along these lines, Continental Europe does not recognize the common law right to self-representation.¹⁵ But *Faretta* recognized a constitutional guarantee flowing from English common law that American criminal defendants may trust themselves to decide on their representation; the state may not impose "an organ of the state" on an unwilling defendant, even if it would probably benefit him.¹⁶ The attorney must be the "assistant" of the defendant, not the "master."¹⁷ The dissenting opinion, however, lamented that the Court had created a constitutional right "to make a fool of himself."¹⁸

The self-representation right thus procedurally resembles the right to be forgotten. Self-representation occurs in Europe (though many countries confine it to less serious cases), but a court must assent to the arrangement,

¹³ FLOYD ABRAMS, *THE SOUL OF THE FIRST AMENDMENT* (2017).

¹⁴ Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Systems*, 12 INT'L LEGAL PRINCIPLES 185, 191, 194, 201 (2001–2002).

¹⁵ Nina H. B. Jorgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. OF INT'L L. 711, 714–17 (2004), citing, e.g., 23 CODE DE PROCEDURE PENALE [C. PR. PEN.] (Partie Legislative) Arts. 274, 317 [France]; 22 STRAFPROZEBORDNUNG [StPO] §§ 140, 240 [Germany].

¹⁶ *Faretta v. California*, 422 U.S. 806, 820 (1975). "Personal liberties are not rooted in the law of averages." *Id.* at 834.

¹⁷ *Id.* at 820.

¹⁸ *Id.* at 852 (Blackmun, J., dissenting).

whereas the Sixth Amendment permits a defendant to invoke the right unilaterally.¹⁹ As this article will show, it is not the only context where Europe seeks to protect individual welfare and America seeks to respect individual autonomy.

A subsequent exchange on the subject between Justice Stephen Breyer, the justice who has most consistently favored incorporating European norms into American constitutional analysis, and Justice Antonin Scalia, the justice who most forcefully advocated for exclusive reliance on American sources, illuminated the values underlying the self-representation debate.²⁰ Justice Breyer’s majority opinion opposed self-representation for a defendant whose questionable mental competence suggested “the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.”²¹ The state thus needed to protect the defendant from his own improvidence. But Justice Scalia defined dignity as the opportunity for self-determination, not a shield against humiliation.

[T]he loss of “dignity” the [self-representation] right is designed to prevent is *not* the defendant’s making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one’s fate rather than a ward of the State — the dignity of individual choice.²²

The competition between these values extends well beyond the courtroom. Like Justice Breyer and unlike Justice Scalia, Europeans endorse the value of state intervention to protect individual welfare. When asked which was more important: “for the state to play an active role in society so as to guarantee that nobody is in need” or “for everyone to be free to pursue their life’s goals without interference from the state,” almost two-thirds of the French and German respondents (and more than two-thirds of the Spanish), but barely one-third of Americans, favored state

¹⁹ Jorgensen, *supra* note 15 at 714–15.

²⁰ *The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. OF CON. L. 519 (2005).

²¹ *Indiana v. Edwards*, 554 U.S. 164, 176 (2008).

²² *Id.* at 186–87 (Scalia, J., dissenting) (boldface added).

intervention over self-determination.²³ Whether the state should actively protect people from harmful outcomes (including humiliation), or respect their self-determination, even when improvidently exercised, is a foundational question that has divided European and American conceptions of “privacy” for well over a century.

Europe and the United States have long maintained different privacy priorities. Professor James Whitman, who has written extensively on the differences between the Continental European and American legal traditions,²⁴ has observed how Europeans have always valued personal dignity and honor, and their public image, so their law seeks to protect individuals from humiliation.²⁵ Americans, by contrast, seek to protect “the realm of private sovereignty.”²⁶ This derives from the individual’s right to exclude the government from one’s home, but extends to other forms of personal sovereignty.²⁷ California’s constitutional norms, developed during the Gold Rush, especially valued individualism and unrestrained speech.²⁸

Professor Whitman cited the aristocratic culture of eighteenth-century France and Germany as the root of European privacy preferences.²⁹ High-status individuals enjoyed an enforceable right to prevent the loss of honor (“public face”) arising from insult or the disclosure of embarrassing information.³⁰ A seminal example involved *The Three Musketeers* author Alexander Dumas père, who posed for relatively salacious photographs with a girlfriend half his age.³¹ Dumas admitted he had sold the rights to the

²³ Pew Research Center, *The American–Western European Values Gap* 7 (2011–12) <http://www.pewglobal.org/2011/11/17/the-american-western-european-values-gap>.

²⁴ See *Two Western Cultures of Privacy*, *supra* note 24; James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279 (2000) (*Enforcing Civility and Respect*); HARSH JUSTICE, *supra* note 9. In many ways, the United Kingdom’s common law tradition accords with the American tradition more than the European one. Unless otherwise indicated, this article will use “European” to refer to the Continental tradition.

²⁵ *Two Western Cultures*, *supra* note 9, at 1164.

²⁶ *Id.* at 1162.

²⁷ *Id.*

²⁸ *Gerawan Farming, Inc. v. Lyons*, 24 Cal.4th 468, 495 (2000).

²⁹ *Two Western Cultures*, *supra* note 9, at 1165.

³⁰ *Id.* at 1162, 1168.

³¹ *Id.* at 1175.

photographer, who registered the copyright.³² To protect Dumas’ honor, however, a court created a new privacy right to compel suppression of the photos.³³ Although Dumas “had forgotten to take care of his dignity,” the court protected it for him, by ordering the photographer to return to Dumas the rights to the photographs.³⁴

American privacy law derives from a different foundation. The seminal decision was *Boyd v. United States* (1886),³⁵ which protected the home, the locus of privacy, from state intrusion.³⁶ *Boyd* relied on the English case of *Entick v. Carrington* (1765),³⁷ and described the Founding Fathers as considering *Entick* the “true and ultimate expression of constitutional law.”³⁸ *Entick* celebrated the “sacred and incommunicable right” to property: “The great end for which men entered into society was to secure their property.”³⁹ This societal purpose would compel a different outcome for *Dumas*. The property right lay with *the photographer*, whose contract would be deemed inviolable under American constitutional law.⁴⁰ Even today, California’s Eraser Law denies the right to remove a post if the minor received compensation or other consideration for it.⁴¹

The California Supreme Court’s decision in *Shulman v. Group W Productions, Inc.* (1998)⁴² reflected this “American” understanding of privacy. A news crew filmed the emergency rescue of automobile accident victims.⁴³ A victim who was disoriented after the accident later objected to broadcasting the rescue.⁴⁴ Asserting her interest in “public face,” valued by Europeans as the right “to have people see you the way you want to

³² *Id.* at 1175–76.

³³ *Id.* at 1176.

³⁴ *Id.* Dumas would not be the last person to pose for risqué photographs and then regret it. See Rosen, *supra* note 8.

³⁵ 116 U.S. 616.

³⁶ *Two Western Cultures*, *supra* note 9, at 1210.

³⁷ 95 Eng. Rep. 807 (K.B. 1765). The *Boyd* Court cited the longer version presented in 19 Howell’s State Trials 1029.

³⁸ *Boyd*, 116 U.S. at 626.

³⁹ *Boyd* at 327, citing *Entick*, 19 How. St. Tr. at 1066, emphasis added.

⁴⁰ See, e.g., *Fletcher v. Peck*, 10 U.S. 87, 138, [6 Cranch] (1810).

⁴¹ CAL. BUS. & PROF. CODE, §22581, subd. (b)(5).

⁴² 18 Cal.4th 200.

⁴³ *Id.* at 210–12.

⁴⁴ *Id.* at 212.

be seen,”⁴⁵ she noted, “I certainly did not look my best, and I don’t feel it’s for the public to see.”⁴⁶ The Court rejected this “European” interest, finding that the newsworthiness of the event, which highlighted the challenges facing emergency workers, justified publication despite the woman’s embarrassment.⁴⁷

But the Supreme Court vindicated her “American” interest in “resistance to invasions of the realm of private sovereignty.”⁴⁸ Endorsing the view that “[h]e who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant,”⁴⁹ the Court held there was a triable issue of fact as to whether the journalist improperly intruded into the victim’s “zone of privacy” by riding along in the rescue helicopter, and/or placing a microphone on the rescuer’s person, amplifying and recording what she said and heard.⁵⁰

The *Shulman* court concluded that information’s newsworthiness could justify *publication* despite the subject’s embarrassment, but the story’s value did not abrogate limitations on its *gathering*. “Intrusion into a private place, conversation or source of information” cannot be justified by the intruder’s goal to “get good material for a news story.”⁵¹ The U.S. Court of Appeals, Ninth Circuit had similarly distinguished between publication and gathering in forbidding investigative journalists from using hidden cameras and tape recorders in the Los Angeles home of their target. “The First Amendment is not a license to trespass, to steal, or to *intrude* by electronic means *into the precincts of another’s home or office.*”⁵²

Shulman reflected an “American” preference for process over outcome in distinguishing between one “who [voluntarily] imparts private information” (and has no right to suppress) and “unauthorized interception” and “secret monitoring” (which might justify suppression).⁵³ It reflected

⁴⁵ *Two Western Cultures*, *supra* note 9, at 1161.

⁴⁶ *Shulman*, 18 Cal.4th at 212.

⁴⁷ *Id.* at 228–30.

⁴⁸ *Two Western Cultures*, *supra* note 9, at 1162.

⁴⁹ *Shulman* at 231, quoting Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973–74 (1964) (n. omitted).

⁵⁰ *Shulman*, at 233.

⁵¹ *Id.* at 242.

⁵² *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (emphasis added).

⁵³ *Shulman* at 234–35.

the constitutional principle that “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”⁵⁴

American law thus protects the individual from external intrusion but not personal indiscretion. The law does not prevent the revelation of salacious photographs where they are voluntarily (if improvidently) *offered*, but there is a right to suppress if they are involuntarily *taken* from the subject by hidden camera.

This First Amendment principle accords with criminal procedure principles. Americans enjoy not only an exceptional protection from governmental searches compared to Europeans⁵⁵ but also an exceptional right to exclude unlawfully taken evidence from trial.⁵⁶ But American law is actually more permissive of evidence obtained through trickery,⁵⁷ where confessions may be attributed to personal improvidence rather than governmental intrusion.⁵⁸

The Anglo-American cases of *Boyd* and *Entick* likewise recognized “consent” as one of the two exceptions to the general rule protecting private property from intrusion. “No man can set his foot upon my ground *without my licence*.”⁵⁹ French law, more paternalistically, constrained the right to consent. A court could find one of the century’s most celebrated novelists had simply “forgotten” to protect his dignity, and vitiate the consent he had freely given.

Europe has long implemented the goal of protecting individuals from improvidence, whether their own or of relatives who could impair the

⁵⁴ *Katz v. United States*, 389 U.S. 347, 351 (1967).

⁵⁵ *See, e.g., Two Western Cultures, supra* note 9, at 1159 (France and Germany tap citizens’ phones 10 to 30 times as often, and Italy and the Netherlands 130 to 150 times as often, as the United States).

⁵⁶ *See Roper v. Simmons*, 543 U.S. 551, 624–25 (2005) (Scalia, J., dissenting).

⁵⁷ Christopher Slogobin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT’L L. 423, 441, 443–44, 446 (2001).

⁵⁸ *See also Colorado v. Connelly*, 479 U.S. 157 (1986) (confession prompted by defendant’s psychosis rather than governmental coercion was constitutionally voluntary).

⁵⁹ *Entick*, 19 How. St. Tr. 1029, 1066, *quoted in Boyd*, 116 U.S. 616, 627 (emphasis added). (The American court changed the spelling to “license.”)

family's standing. Unlike America, which has followed the English rule allowing a testator to distribute his wealth as he chose, permitting the complete disinheritance of any (or all) of his children, France, Germany, and other civil law nations, more concerned with equality (and fraternity), have restricted testamentary autonomy for the sake of a relatively equal division among heirs.⁶⁰ For Anglo-Americans, the priority is letting individuals control their fate; Europe subordinates self-determination to protecting individuals (and their heirs) from improvidence.

An even more interesting European restriction on autonomy for the sake of saving offspring from parental improvidence is the practice of restricting parents' choice of a baby's name.⁶¹ Germany, for example, maintains a list from which parents must choose their child's name.⁶² The infringement on self-determination is unfathomable to Americans, but "Europeans say that the state simply must intervene to protect children against the stupidities of their parents."⁶³ But a government that takes the stupidity of adults as its premise will also deny them the authority to make other decisions, or have access to disputed information.

A second ground for limiting the right to property or liberty was criminal misconduct; *Boyd* observed these rights could be "forfeited by his conviction of some public offense."⁶⁴ This accorded with waiver by consent, because crime was considered a voluntary act, chosen by a morally responsible agent,⁶⁵ so punishment was the "agent's own act."⁶⁶ The state designed punishment to induce rational, self-interested actors to follow the law and

⁶⁰ JENS BECKERT, *INHERITED WEALTH*, 35–37, 62, 69–70 (English ed. 2008); Barbara Willenbacher, *Individualism and Traditionalism in Inheritance Law in Germany, France, England and the United States*, 28 J. OF FAM. HIST. 208, 210 (2003). For the French, the objection to testamentary freedom lay in "the sacred principles of natural equality" (BECKERT, at 30, quoting Mirabeau, 2 April 1791); for the Germans, it was the objection to an individualism that denigrated family obligations.

⁶¹ *Two Western Cultures*, *supra* note 9, at 1216.

⁶² *Id.* Although Monty Python's "Ministry of Silly Walks," was entirely fictional, there really is a registry of "Silly Names."

⁶³ *Two Western Cultures*, *supra* note 9, at 1217.

⁶⁴ *Boyd*, 116 U.S. 616, 630.

⁶⁵ MARTIN J. WIENER, *RECONSTRUCTING THE CRIMINAL: CULTURE, LAW AND POLICY IN ENGLAND, 1830–1914* 11 (1990).

⁶⁶ Markus Dirk Dibber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 L. & HIST. REV. 113, 118, (1998) quoting J.D. Mabbott, *Freewill*

avoid crime.⁶⁷ The contemporary Supreme Court, with Justice Scalia leading the way, has continued to champion the view that punishment shapes criminals’ decision-making, so they choose their punishment.⁶⁸

Nineteenth-century Europe viewed criminals more sympathetically, as the state prerogative to outlaw nonharmful conduct led to the imprisonment of dissidents, duelists and debtors, people who were not “really criminals.”⁶⁹ Criminal convictions thus did not stigmatize the individual as much as in America.⁷⁰ European privacy law protected high-status individuals from embarrassment, with less regard for whether the status was deserved or not. “[P]rying and insults . . . violate the law when they tend to destroy, through public revelation . . . honor justly or *unjustly acquired*.”⁷¹

Both Europe and America thus tended to protect from external derogation that which gave individuals status within their social community. In Europe, this was honor and reputation, usually inherited from one’s ancestors. In America, it was property, often earned personally.

America authorized individuals to waive these rights, through consent, or forfeit them, through criminal misconduct. To use Justice Scalia’s later phrase, the American was the “master of one’s fate,”⁷² who could alienate his rights, however inadvisably. Europe did more to protect individuals from the consequences of their improvidence (especially where it would harm the entire family).

For much of the nineteenth century, the “classical school” of criminology relied on the Enlightenment premise of human rationality. But America and Europe would discard the classical model and embrace the principles of “scientific” criminology, which shaped criminal law from the

and Punishment, in CONTEMPORARY BRITISH PHILOSOPHY: PERSONAL STATEMENTS 303 (Richard I. Aaron and Hywel David Lewis eds. 1956).

⁶⁷ DANIEL J. CURRANT & CLAIRE M. RENZETTI, THEORIES OF CRIME 11 (2001).

⁶⁸ *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring): “[T]he criminal will never get more punishment than he bargained for when he did the crime”; see also *Blakely v. Washington*, 542 U.S. 296, 309 (2004). As with his position on self-representation, Scalia in *Apprendi* and *Blakely* prioritized individual choice in determining one’s future (sentence) over the state’s providing a more benign one.

⁶⁹ HARSH JUSTICE, *supra* note 9, at 108, 120, 178.

⁷⁰ *Id.* at 178–79, 196–97.

⁷¹ *Two Western Cultures*, *supra* note 9, at 1179, quoting EMILE BEAUSSIRE, LES PRINCIPES DU DROIT (1888) (emphasis added).

⁷² *Indiana v. Edwards*, 554 U.S. 164, 186–87 (2008) (Scalia, J., dissenting).

late nineteenth century until the last quarter of the twentieth century.⁷³ In allowing Americans to alienate (often improvidently) their right to counsel in *Faretta*, just as they could more freely alienate their dignity through improvident photographs or alienate their property through improvident bequests, the 1975 decision provided an inflection point, from which the two continents would diverge.

California would soon provide other inflection points for this divergence.

II. PUNISHMENT

The Enlightenment philosophy of Kant and Hegel, deriving from the premise of human rationality, posited that all citizens could combine to devise, follow, and enforce laws as members of an equal community.⁷⁴ Retributive punishment was therefore the legitimate consequence of freely chosen behavior.⁷⁵ The classical school considered the primary preventive function of punishment to be general deterrence,⁷⁶ as “[t]he guiding vision of . . . criminal justice was that of the responsible individual,” who could be influenced by adequate punishment to avoid wrongdoing (and deserve it if he did not).⁷⁷

Owing as much to Darwin as the Enlightenment,⁷⁸ the “scientific school” of criminology displaced this model,⁷⁹ positing: “The new view

⁷³ Mitchell Keiter, *How Evolving Social Values Have Shaped (and Reshaped) California Criminal Law*, 4 CAL. LEGAL HIST. 393, 397–400 (2009); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1020 (2016).

⁷⁴ Dibber, *supra* note 66, at 117–18.

⁷⁵ *Id.* at 118.

⁷⁶ General deterrence works by informing the general public of the consequences for an offense; specific deterrence works on the individual, tailored to his circumstances. The rehabilitation model essentially encompasses specific deterrence.

⁷⁷ Wiener, *supra* note 65, at 11.

⁷⁸ “Humans were beginning to appear to scientists merely as one type of creature, with no special links to divinity . . . [as well as] creatures whose conduct was influenced, if not determined, by biological and cultural antecedents rather than self-determining beings who were free to do what they wanted.” CURRANT & RENZETTI, *supra* note at 15, quoting G.B. VOLD & T.J. BERNARD, *THEORETICAL CRIMINOLOGY* 36 (3d ed. 1986).

⁷⁹ Keiter, *supra* note 73, at 398.

of crime and criminals is, that what a man does is a result of his heredity and his environment”⁸⁰ Lacking the classical school’s confidence in individuals’ rational agency, the criminologists of the scientific school de-emphasized deterrence; punishment’s goal was not so much to deter the wicked as to heal the weak.⁸¹ This “diminished estimate” of individuals’ agency invited the state “to assume even greater powers in ‘correcting’ problems now deemed beyond the individual’s power to alter.”⁸² If people could not govern themselves, the state would do it for them.

Criminologists spoke of crime in medical terms; it was no more or less than a treatable disease.⁸³ As the 1931 report of the National Commission on Law Observance and Enforcement (Wickersham Commission) declared, “Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No more can judges intelligently set the day of release from prison at the time of trial.”⁸⁴ As the criminal law moved away from treating criminals as responsible individuals, sentencing became less retributive and more rehabilitative, determining criminal punishment not so much according to the criminal *offense* than the criminal *offender*.⁸⁵ Retribution was no longer the primary objective of the criminal law, and many found it an improper consideration altogether.⁸⁶ California and other jurisdictions adopted indeterminate sentencing, whereby sentence length was decided not by judges upon conviction but “correctional” officers during the rehabilitative process.⁸⁷

⁸⁰ ERNEST BRYANT HOAG & EDWARD HUNTINGTON WILLIAMS, *CRIME, ABNORMAL MINDS AND THE LAW* xxi (1923).

⁸¹ Keiter, *supra* note 73, at 399.

⁸² Wiener, *supra* note 65, at 338; Mimi Ajzenstadt & Brian E. Burtch, *Medicalization and Regulation of Alcohol and Alcoholism: The Professions and Disciplinary Measures*, 13 INT’L J.L. & PSYCHIATRY 127, 135 (1990).

⁸³ Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. & CRIMINOLOGY 883, 893 n.62 (1990).

⁸⁴ *Id.*, quoting the 1931 Wickersham Commission.

⁸⁵ *People v. Love*, 53 Cal.2d 843, 856 n.3 (1960).

⁸⁶ *Id.*

⁸⁷ Rehabilitative-based, indeterminate sentencing was not necessarily more favorable to defendants than retributive punishment; for example, retribution could never justify a sentence of life imprisonment (one year to life) for the offense of indecent exposure, as occurred under California’s indeterminate sentencing model. But in the context of murder, rehabilitation would offer a chance at release, which retribution would not.

The emphasis on rehabilitation generated a right to be forgotten. In the very year of the Wickersham Commission's Report, the California Court of Appeal decided *Melvin v. Reid*.⁸⁸ Gabrielle Darley Melvin had been a prostitute and was tried and acquitted for murder. In 1919, after her acquittal, as the California Court of Appeal explained, she "became entirely rehabilitated" and commenced living an "exemplary, virtuous, honorable and righteous life."⁸⁹ The defendants produced a film in 1925, *The Red Kimono*, which chronicled the true story of her "past life" with its "unsavory incidents."⁹⁰ The film led her new friends to scorn and abandon her, exposed her to ridicule, and caused her mental and physical suffering. The defendants denied that her allegations stated a cause of action.⁹¹

The Court of Appeal acknowledged that the defendants could describe her life story, as the trial was a matter of public record.⁹² But the court found actionable the film's use of her real name.⁹³ The court recognized that neither the common law nor any California statute barred such use. Like the French court in *Dumas*, the California Court of Appeal discerned a new right, rooted in the opening of the California Constitution, which guaranteed every individual "the right to pursue and obtain happiness."⁹⁴ Because Mrs. Melvin had "rehabilitated herself and taken her place as a respected and honored member of society" she was entitled not to have "her reputation and social standing destroyed by the publication."⁹⁵ The decision was aspirational, resting on how people (including the media) *ought to* behave, as it chastised the producers for their "unnecessary and indelicate" use of her maiden name, which reflected a "willful and wanton disregard of that charity which should actuate us in our social intercourse."⁹⁶

⁸⁸ 112 Cal. App. 285 (1931).

⁸⁹ *Id.* at 286.

⁹⁰ *Id.* at 287.

⁹¹ *Id.* By demurring, the defense conceded that Melvin's account was true for the purpose of litigation, though the historical record offers room for doubt.

⁹² *Id.* at 290.

⁹³ *Id.* at 291–92.

⁹⁴ *Id.* at 291, citing CAL. CONST. art. I, § 1.

⁹⁵ *Id.* at 292.

⁹⁶ *Id.* at 291. The Delaware Supreme Court would express its doubt that speech could be restricted whenever it was "indelicate," as "the standard of good taste" was "too elusive to serve as a workable rule of law." *Barbieri v. News-Journal Co.*, 189 A.2d 773, 776 (Del. 1963).

But the primary basis for the result was the prevailing philosophy of criminal law, which the court extended to society as a whole:

One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology, it is our object to lift up and sustain the unfortunate rather than tear him down.⁹⁷

As a federal court would later recall, *Melvin v. Reid* created “an entire branch of the tort law of privacy.”⁹⁸

The California Supreme Court relied on *Melvin*’s reasoning forty years later when *Reader’s Digest* published an article describing how Marvin Briscoe had hijacked a truck in 1956.⁹⁹ The article described several hijacking incidents and the trucking industry’s response.¹⁰⁰ It recalled that Briscoe “fought a gun battle” with police but did not mention when it occurred.¹⁰¹ Following Mrs. Melvin’s lead, Briscoe conceded that the magazine could describe the event but challenged its use of his name, contending it likewise caused friends and family to scorn and abandon him, and exposed him to humiliation and ridicule.¹⁰²

The California Supreme Court’s analysis vindicated the European privacy interest in saving “face” and preventing humiliation. “Loss of control over which ‘face’ one puts on may result in literal loss of self-identity [citations] and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.”¹⁰³

The Supreme Court offered a three-factor balancing test, and found that Briscoe, like Melvin, had stated a cause of action.¹⁰⁴ The court resolved the first factor, the social value of the published facts, by finding that a reasonable jury could find minimal social value in publishing Briscoe’s

⁹⁷ *Id.* at 292.

⁹⁸ *Doe v. Chicago*, 360 F.3d 667, 672 (7th Cir. 2004).

⁹⁹ *Briscoe v. Reader’s Digest Ass’n, Inc.*, 4 Cal.3d 529, 532 (1971).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 532–33.

¹⁰² *Id.* at 533.

¹⁰³ *Id.* at 534.

¹⁰⁴ *Id.* at 544.

name.¹⁰⁵ Second, “the depth of the article’s intrusion into ostensibly private affairs” supported suppression because most people would find “revealing’s one criminal past” highly offensive to most Americans.¹⁰⁶ And third, the plaintiff in no way voluntarily consented to the publicity: “His every effort was to forget and have others forget that he had once hijacked a truck.”¹⁰⁷

The opinion lacked a dissent, which could have challenged some of these assumptions. Defining the public criminal act as a “private affair” based on the perpetrator’s *desire to keep it private* would permit any misdeed to qualify as private and justify suppression. And unless criminals had a reasonable expectation of privacy in a public, violent act, its voluntary commission could be seen as “knowingly expos[ing it] to the public,” rendering it fair game for public description. Perhaps the most disturbing part (of either the findings or the test itself) was that speech could be actionable so long as a reasonable trier of fact could find it lacked “social value.” Such value may well lie in the eye of the beholder; few writings, whether articles or complete books, attract the interest of a popular majority. Many of history’s most significant works would never have enriched public discussion if the political majority had been able to suppress them for lacking adequate “social value.” As a contemporary commentary observed, the social value test improperly grants the judiciary “a censorship role, deciding what the public should read, see or hear.”¹⁰⁸ Although other states declined to adopt the social value test,¹⁰⁹ contemporary Europe remains more willing to vest courts with authority over what the public should read, see, or hear.¹¹⁰

The Supreme Court, like the Court of Appeal in *Melvin*, ultimately grounded its conclusion in penal policy:

One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from

¹⁰⁵ *Id.* at 541–42.

¹⁰⁶ *Id.* at 542.

¹⁰⁷ *Id.*

¹⁰⁸ Don R. Pember & Dwight L. Teeter, Jr., *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 81 (1974).

¹⁰⁹ *Id.* at 78, 81.

¹¹⁰ See Part IV.

which he has been ostracized for his anti-social acts. In return for becoming a “new man,” he is allowed to melt into the shadows of obscurity.¹¹¹

The court expressly referenced indeterminate sentencing:

The purpose of the indeterminate sentencing law in California . . . is “to put before the prisoner great incentive to well-doing [citations].” The indeterminate sentence law in theory “affords a person convicted of crime the opportunity to minimize the term of imprisonment by rehabilitating himself in such manner that he may again become a useful member of society.” [Citation.]¹¹²

Within a decade, the Supreme Court would declare that the “most important” basis for its *Briscoe* decision was the state’s “compelling interest in the rehabilitative process,” as media disclosure of criminals’ identity counteracted that process.¹¹³ This basis appeared so central to the decision that the New Jersey Supreme Court construed the California Supreme Court as limiting *Briscoe*’s publication bar to “cases involving the identity of rehabilitated convicts.”¹¹⁴

Germany’s Constitutional Court addressed a comparable issue.¹¹⁵ The anonymous petitioner had participated in a terrorist act that killed several soldiers. After serving two-thirds of his six-year sentence, he was set to be released. A television station planned a documentary play about the incident, which planned to use the petitioner’s name and likeness. The Constitutional Court granted an injunction because the publication could violate his right to personality.

Germany’s constitution recognized a greater right to suppress information than its American counterpart. “Everyone has the right in principle to determine himself alone whether and to what extent others may represent in public an account of his life or of certain incidents thereof.” The German constitution protected both the press’ right to speak and the subject’s right

¹¹¹ *Briscoe*, 4 Cal.3d. at 539.

¹¹² *Id.* at 539 n.12.

¹¹³ *Forsher v. Bugliosi*, 26 Cal.3d 792, 810 (1980).

¹¹⁴ *Romaine v. Kallinger*, 537 A.2d 284, 295 (N.J. 1988).

¹¹⁵ *Lebach* case, 35 BVerfGE 202. The article quotes from the translated version provided by F H Lawson & B S Markesinis at <https://germanlawarchive.iuscomp.org/?p=62>.

to suppress unwanted descriptions, and neither could claim precedence as being more fundamental. Resolving the conflict required case-by-case judicial balancing, which denied the press any general guidance.

The court acknowledged (as *Briscoe* seemingly had not), that the petitioner's voluntary criminal act had generated the public interest.¹¹⁶ Disclosure could thus serve as an additional form of punishment (or deterrent). But the court also followed the principle that the "decisive point of reference" was "the interest in reintegrating the criminal into society"; the interest was not just the individual's but that "of the community to restore his social position." Once the event was no longer "current," a television station "undoubtedly" could not disclose the information "if it endangers the social rehabilitation of the culprit." Just as statutes of limitations could restrict *prosecuting* criminal acts, so too could one restrict *speaking* about them. This contrasted with a California appellate decision denying that the "mere passage of time" could bar publication of events involving a person formerly in the public eye.¹¹⁷

Despite the similarities between *Briscoe* and *Lebach*, American and European penal policy diverged in the 1970s in a way that would also shape the disclosure issue. The United States generally and California specifically abandoned the formerly ascendant imperative of rehabilitation. The United States Supreme Court justified punishment for the sake of retribution.

[P]unishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else . . . [S]ome crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.¹¹⁸

In 1977, California replaced its indeterminate sentencing law with one imposing determinate sentences, graded in accordance with the objective severity of the offense, not the offender's subjective progress during rehabilitation. Its preamble announced, "The Legislature finds and declares that

¹¹⁶ The "public interest in information [was] caused by himself by his own deed."

¹¹⁷ *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 118 (1961).

¹¹⁸ *Gregg v. Georgia*, 428 U.S. 153, 184 n.30 (1976).

the purpose of imprisonment is punishment.”¹¹⁹ And in 1978, California voters answered the California Supreme Court’s 1972 decision abolishing capital punishment¹²⁰ with an initiative reinstating it,¹²¹ notwithstanding the penalty’s permanently foreclosing the possibility of rehabilitation.¹²²

But Europe retained the rehabilitation imperative, keeping the “scientific” understanding of criminals as “sick” rather than sinful.¹²³ Germany’s peculiar postwar status generated a special motivation to emphasize rehabilitation and reintegration.¹²⁴

Unlike Americans (or Britons), Germans “feel a burning need to deny that there is such a thing as *immutable* evil, *unforgivable* evil, in order to reconcile themselves to what their culture and people — indeed their *families*, and their parents and grandparents — have done.”¹²⁵ In fact, much of the support for Germany’s abolishing capital punishment in 1949 derived from the motivation to save Nazi war criminals from execution.¹²⁶

Germany also was the European pioneer in abolishing the sentence of life imprisonment without possibility of parole, which it did judicially in 1977; Italy followed in 1987 and France in 1994.¹²⁷ As Germany’s Constitutional Court later explained, “[a]n offender had to be given the chance, after atoning for his crime, to re-enter society,”¹²⁸ even where the crime was sending fifty people to the gas chambers:

¹¹⁹ CAL. STATS 1976, ch. 1139 § 273. The law has since been amended to revise the purpose as “public safety,” prescribing prison terms “that are proportionate to the seriousness of the offense.” CAL. PEN. CODE, § 1170, subd. (a)(1).

¹²⁰ *People v. Anderson*, 6 Cal.3d 428 (1972).

¹²¹ CAL. PEN. CODE, §§ 190 et seq.

¹²² Over the next four decades, many California criminal law doctrines would shift to place more emphasis on “the maintenance of personal security and social order” and less on “an accurate discrimination as to the moral qualities of individual conduct.” Keiter, *supra* note 73, at 395, 441, citing *People v. Blake*, 65 Cal. 275, 277 (1884).

¹²³ Kleinfeld, *supra* note 73, at 981.

¹²⁴ *Id.* at 1035.

¹²⁵ *Id.*

¹²⁶ *Id.* at 988.

¹²⁷ *Id.* at 955.

¹²⁸ *Life Imprisonment case (lebenslange Freiheitsstrafe)* 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187 (1977), quoted in *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 28 (2013).

[The] judicial balancing of these [sentencing] factors *should not place too heavy an emphasis on the gravity of the crime* as opposed to the personality, state of mind, and age of the person. In that case, any subsequent review of the petitioner's request for release would be required to weigh more heavily than before the petitioner's personality, age and prison record. This was because the negative effects of sentence became stronger and stronger after an unusually long period of imprisonment.¹²⁹

Lebach's reintegration goal of restoring wrongdoers to their former position limits not only the state in *imprisoning* such offenders but private citizens in *speaking* about their past misconduct, as former collaborators with the Vichy regime or Nazis may seek defamation relief for reference to their wartime activities.¹³⁰

The California Supreme Court would reject this notion that, eventually, time heals all wounds:

Insofar as the “just desserts” theory holds that certain murderers do not deserve a fate better than that inflicted on their victims, the passage of time and alteration of circumstances have no bearing on this retributive imperative. [Citation.] For these reasons, Nazi war criminals and church bombers motivated by racial hatred have been prosecuted for murders committed decades earlier.¹³¹

The contrasting premises expressed in these two quotations help explain why the “right to be forgotten” had gained less traction in the United States.

The scientific school's paternalistic premise, that individuals are not (or are barely) capable of rational self-determination, benefits convicts seeking parole, or people seeking to suppress disclosure of past misconduct. But it

¹²⁹ *War Criminal* case, 72 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 105 (1986) (emphasis added), *quoted in Vinter* at 28. This echoed the *Lebach* reasoning that, as time passes, the “right ‘to be left alone’ gains increasing importance in principle and limits the desire of the mass media and the wish of the public to make the individual sphere of his life the object of discussion.”

¹³⁰ *Enforcing Civility and Respect*, *supra* note 24, at 1356–57. The policy gives ironic resonance to the iconic line of the British comedy *Fawlty Towers*, where hotel staff hosting German guests were advised emphatically: “Don't mention the war!”

¹³¹ *People v. Ochoa*, 26 Cal.4th 398, 463 (2001). As a chambers attorney, the author drafted this opinion for the California Supreme Court.

also has consequences for an individual’s right to receive information and be trusted to use it properly.

III. JURY TRIAL

The United States differs from the European Union in guaranteeing a criminal defendant’s right to trial by jury.¹³² American law trusts the public rather than a state professional to determine both the defendant’s guilt and the maximum possible sentence.¹³³ California courts had long debated just how much to trust jurors with information needed to adjudicate guilt, and then voters themselves expressed their position through a 1982 initiative.

The common law historically deemed felons incompetent to testify at all; testifying was thus one of those rights that could be forfeited through criminal misconduct.¹³⁴ The law evolved to permit their testimony but allow impeachment with their past crimes.¹³⁵ Attorneys may thus present *witnesses’* convictions to challenge their *credibility*, though prosecutors ordinarily may not present *defendants’* convictions to prove their *guilt*.¹³⁶ Nevertheless, convictions offered for impeachment could have that effect.¹³⁷

This creates a legal quandary: informing the jury of a defendant’s past crimes could lead it to improperly find him guilty of the current offense, but denying the jury that information might grant his testimony a “false aura of veracity.”¹³⁸ Whether to let the public learn of a neighbor’s past misconduct presents a similar dilemma.

¹³² Like self-representation, jury trial exists (in modified form) on the Continent but is not a guaranteed right. *The jury is out*, THE ECONOMIST (Feb. 12, 2009), <http://www.economist.com/node/13109647>.

¹³³ *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

¹³⁴ *See Boyd v. United States*, 116 U.S. 616, 630 (1886).

¹³⁵ *People v. Castro*, 38 Cal.3d 301, 325–26 (Bird, C.J., dissenting).

¹³⁶ *But see* CAL. EVID. CODE § 1108 (permitting evidence of past sex offenses to establish guilt); CAL. EVID. CODE § 1109 (permitting evidence of past domestic violence to establish guilt).

¹³⁷ “[P]rior convictions, while relevant to a witness’s honesty or veracity . . . at the same time may be unduly prejudicial.” *Schullman v. State Bar*, 10 Cal.3d 526, 540 (1973).

¹³⁸ *People v. Beagle*, 6 Cal.3d 441, 453 (1972).

In the 1970s, the California Supreme Court tightened the admissibility of prior convictions for impeachment purposes.¹³⁹ The trend reached its peak (or nadir) in 1975, when the court reversed the murder conviction of Frank Antick in part because the trial court had allowed the jury to learn of Antick's 1955 and 1957 forgery convictions. Consistent with the principles of rehabilitation expressed in *Briscoe* and the *Lebach* case, the court emphasized the convictions' "remoteness" in compelling their suppression: "A conviction which the defendant suffered many years before, '[e]ven one involving fraud or stealing,' is at best very weak evidence that he is perjuring himself at trial."¹⁴⁰

Voters responded by amending the California Constitution to provide, in pertinent part: "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding."¹⁴¹ Though the Supreme Court trimmed the absolute reach of this provision, it nevertheless altered the court's analysis from the preceding decade, and authorized greater impeachment through past convictions than had existed in the 1970s.¹⁴² The voters insisted they be trusted to use and not misuse this information.¹⁴³

The value of information about an individual's past justifies reference to that past in judicial proceedings (at least for impeachment purposes), as well as the state's maintaining databases of those committing child abuse¹⁴⁴ or sexual offenses.¹⁴⁵ But it is not just the government that can benefit from widely available information about personal histories; the entire public craves such information to exercise the right to "informed living," defined

¹³⁹ *People v. Castro*, 38 Cal.3d at 307–08 (see cases collected therein).

¹⁴⁰ *People v. Antick*, 15 Cal.3d 79, 98, quoting *People v. Beagle*, 6 Cal.3d 441, 453.

¹⁴¹ CAL. CONST., art. I, § 28, subd. (f).

¹⁴² *Castro*, 38 Cal.3d at 306–12.

¹⁴³ In the 1990s, the California Legislature authorized prosecutors to introduce evidence of past sex crimes (Evidence Code section 1108) or domestic violence (Evidence Code section 1109) to show defendants' substantive guilt. This followed Congress' comparable decision to permit such use of past sexual assaults (Federal Rule of Evidence 413) or child molestation (Federal Rule of Evidence section 414).

¹⁴⁴ CAL. PEN. CODE, §§ 11164, et seq.; see *Los Angeles v. Humphries*, 562 U.S. 29, 31 (2011).

¹⁴⁵ CAL. PEN. CODE, § 290.

as people’s “right to exercise an informed choice about those with whom they live and associate.”¹⁴⁶ The countless online searches conducted every day regarding prospective employees or romantic partners confirm the popularity of this right.

But underlying both *Briscoe* and *Lebach* was the premise that imposing consequences on violent criminals was exclusively a state prerogative; private persons could not later choose to exclude them from their intimate circles. Imprisonment was the prescribed consequence, after which, according to the German court, the decisive point of reference was the community’s interest in restoring the criminal to his former position, even though such restoration required keeping his friends and neighbors ignorant about his past conduct.¹⁴⁷ The *Briscoe* court likewise concluded a convicted criminal was entitled upon release from prison to wear a figurative “mask” to hide from friends and family his violent past,¹⁴⁸ even though that could create a “false aura” of peacefulness.¹⁴⁹ These pre-*Faretta* decisions assumed people would make the “wrong” decision (unduly stigmatizing offenders), so the state would prevent them from doing so by denying them the information, and the opportunity to choose for themselves.

Decisions like *Melvin*, *Briscoe*, and *Lebach* denied that ordinary citizens can be trusted with such information; *Melvin* was “paternalistic in doubting the ability of people to give proper rather than excessive weight to a person’s criminal history.”¹⁵⁰ The resiliency of many people in surmounting embarrassing disclosures casts doubt upon *Melvin*’s conclusion that the public gives so much weight to such information that disclosure will invariably “throw [the subject] back into a life of shame or crime.”¹⁵¹ One well-known example of an embarrassing disclosure occurred in the 1980s, when *Penthouse* magazine published naked photographs taken years earlier

¹⁴⁶ Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 807 (2005).

¹⁴⁷ *Lebach* case, 35 BVerfGE 202.

¹⁴⁸ *Briscoe*, 4 Cal.3d 529, 539.

¹⁴⁹ *People v. Beagle*, 6 Cal.3d 441, 453 (1972). The *Lebach* case expressly permitted disclosure if it was for the purpose of eliciting sympathy rather than creating a “negative slant.”

¹⁵⁰ *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002) (emphasis added).

¹⁵¹ *Melvin*, 112 Cal. App. 285, 292.

of the reigning Miss America, Vanessa Williams. But Williams was a talented singer and actress, and despite the humiliation, went on to a very successful career. Americans are more forgiving than the *Melvin* court assumed, though more for indecencies like naked photographs than for grave crimes like mass murder.

Although *Briscoe* denied that disclosure of past crimes offered any “social value,”¹⁵² nothing better establishes its value than the post-appeal life of Gabrielle Darley Melvin. The Court of Appeal characterized her rehabilitation in glowing terms because it was evaluating the defense’s demurrer, and thus needed to presume the truth of her complaint.¹⁵³ But despite her alleging that she “became entirely rehabilitated” after her acquittal and “at all times lived an exemplary, virtuous, honorable, and righteous life,”¹⁵⁴ the truth was more complicated. She returned to prostitution, primarily in a management capacity.¹⁵⁵ Her 1915 victim (whom she admitted shooting) would be joined by others; a total of six men in her life (plus one of her female employees) ultimately were either shot, poisoned, or died under mysterious circumstances.¹⁵⁶ One or more of these individuals might have benefited from greater access to information about her past.

America places more trust than Europe in ordinary citizens to determine guilt in criminal proceedings, recognizing a fundamental right to trial by jury. This participation, essential to democratic self-government, presumes jurors can be trusted to use and not misuse information. The United States also facilitates democratic self-government by trusting its citizens to

¹⁵² *Briscoe*, 4 Cal.3d 529, 541–42.

¹⁵³ *Melvin*, 112 Cal. App. 285, 292; see *Doe v. Chicago*, 360 F.3d 667, 672.

¹⁵⁴ *Melvin*, at 286.

¹⁵⁵ Leo W. Banks, *A Madam, A Murder, A Mystery*, PHOENIX NEW TIMES, Aug. 12, 1999, <http://www.phoenixnewtimes.com/news/a-madam-a-murder-a-mystery-6420333> (Banks).

¹⁵⁶ *Id.* Even her trial defense relied on the absence of truthful information about her past; she claimed to have been orphaned by the San Francisco earthquake of 1906, though she actually had been born in France and emigrated as a teenager. She portrayed the abuse imposed on her by the victim (her pimp/fiancé) so graphically that the foreman explained after the jury’s *eight-minute* deliberation: “She righted a wrong that had been done her.”

use and not misuse speech to determine policy through public debate and elections. Access to information is a precondition for such debate.

IV. FREE SPEECH

The California Supreme Court disapproved the 1971 *Briscoe* decision in 2004.¹⁵⁷ Not surprisingly, the court cited not the intervening developments regarding penal philosophy or witness impeachment but United States Supreme Court precedents addressing the reach of the First Amendment. These more recent cases protecting disclosure of assertedly private information show how the United States values and protects free speech more than does Europe.

The first of the intervening cases may have been the most wrenching factually; a television news broadcast disclosed the name of a 17-year-old who had been murdered in the course of a rape.¹⁵⁸ The Supreme Court’s decision rested on the American concept of privacy described by Professor Whitman, and applied by the California Supreme Court in *Shulman*.¹⁵⁹ Publication infringed the European privacy imperative, as it was “embarrassing or otherwise hurtful” to the father.¹⁶⁰ But there was no “physical or other tangible intrusion into a private area,” as the information was gathered lawfully from public judicial records.¹⁶¹ Ultimately, the court justified publication on the public interest in information about the administration of a government “in which *the citizenry is the final judge* of the proper conduct of public business.”¹⁶²

¹⁵⁷ *Gates v. Discovery Communications, Inc.*, 34 Cal.4th 679 (2004).

¹⁵⁸ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471–74 (1975). In earlier proceedings, the Georgia Supreme Court had cited *Briscoe* in concluding the First Amendment did not necessarily trump the father’s privacy interest. *Cox Broad. Corp. v. Cohn*, 200 S.E.2d 127, 133–34 (Ga. 1973).

¹⁵⁹ *Two Western Cultures*, *supra* note 9, at 1162, 1165; *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200 (1998).

¹⁶⁰ *Cox*, 420 U.S. at 489.

¹⁶¹ *Id.* at 489, 491.

¹⁶² *Id.* at 495 (emphasis added). In a later case, the Court likewise protected a newspaper’s disclosing the name of a (surviving) rape victim even where it gathered the information, not from public judicial records, but a police report, which inadvertently included the victim’s name. But the Court again emphasized that the newspaper committed no misconduct in the process of gathering the information. *The Florida Star v. B.J.F.*, 491 U.S. 524, 536, 538 (1989).

Easier cases concerned disclosure of the names of alleged perpetrators.¹⁶³ In urging the court to reject a right to publish, the petitioners asserted the rehabilitation interest that the California Supreme Court had found compelling in *Melvin and Briscoe*. “It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense.”¹⁶⁴ But the rehabilitation imperative was already receding by 1979, and the court refused to justify suppression for that purpose.¹⁶⁵

The Supreme Court made no mention of the California electorate’s voting to reinstate capital punishment, or to authorize impeachment through prior convictions.¹⁶⁶ But the initiative process indirectly explains why the First Amendment protects speech more fully than its European counterpart(s): No European nation offers ordinary voters the same direct opportunity to influence law and policy. Europeans have less opportunity than Americans generally (and Californians specifically) to reshape law through the initiative process. Even beyond that context, Americans exercise more influence on policy. Americans directly vote for their senators and representatives, so these officials owe their position, and their loyalty, to these voters. By contrast, many European parliaments follow a proportional system, where party leaders assign legislators a place on the party list, and the number of votes received by the party nationwide determines how many candidates on that list take office. Under this kind of system, legislators ultimately owe their position to party leaders rather than voters, minimizing their responsiveness to constituent preferences.¹⁶⁷

The criminal punishments described in Part II reflect the relative influence of American voters and the political insignificance of their European counterparts. Just as the California Supreme Court’s 1972 decision banning capital punishment¹⁶⁸ produced a popular initiative reinstating

¹⁶³ *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979); *Oklahoma Publ’g Co. v. Oklahoma County Dist. Court*, 480 U.S. 308 (1977).

¹⁶⁴ *Daily Mail*, 443 U.S. at 104.

¹⁶⁵ *Id.* at 104–05.

¹⁶⁶ The case predated the impeachment initiative by three years.

¹⁶⁷ Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 474–75 (2006).

¹⁶⁸ *People v. Anderson*, 6 Cal.3d 628 (1972).

it,¹⁶⁹ the indication from several United States Supreme Court justices that they might also abolish the punishment¹⁷⁰ produced a nationwide reaction. Support for the death penalty rose substantially, state legislatures (and electorates) reformed their punishment statutes to pass the Supreme Court’s standards, more juries imposed it, and elected officials pledged to implement it.¹⁷¹ The same popular reaction occurred most recently in Nebraska; the Legislature voted in 2015 to abolish the death penalty and voters the next year reinstated it by initiative, by more than a three-to-two ratio.¹⁷² By contrast, although at least 85 percent of Europeans in every surveyed nation (France, Germany, Italy, Spain, and the United Kingdom) favor the option of a life-without-parole sentence for an especially egregious offender like Osama bin Laden, the European Court of Human Rights’ 2013 *Vinter* decision¹⁷³ banning that sentence has not faced any democratic counter-proposal.¹⁷⁴

The free exchange of information promotes the efficient operation of a government where “the citizenry is the final judge.”¹⁷⁵ As the U.S. Supreme Court explained in *New York Times v. Sullivan*, the First Amendment

¹⁶⁹ CAL. PEN. CODE, § 190 et seq.

¹⁷⁰ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁷¹ See, e.g., Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007); *Legislative Response to Furman v. Georgia — Ohio Restores the Death Penalty*, 8 AKRON L. REV. 149 (1974).

¹⁷² Kim Bellware, *Nebraska Voters Restore the Death Penalty*, HUFFINGTON POST, Nov. 9, 2016, https://www.huffingtonpost.com/entry/nebraska-death-penalty_us_58226bfee4b0e80b02cdb66e.

¹⁷³ *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 (2013). The European Court backtracked somewhat in 2017, finding the United Kingdom’s whole life punishment protocols complied with *Vinter*, even though the U.K. did not amend those provisions after that case. *Case of Hutchinson v. United Kingdom*, Eur. Ct. H.R. 57592/08 (2017).

¹⁷⁴ Ipsos MORI, *Death Penalty–International Poll*. <https://www.ipsos.com/ipsos-mori/en-uk/death-penalty-international-poll>. Individual European nations had banned the death penalty despite public support, sometimes encompassing more than two-thirds of the population. ANDREW HAMMEL, *ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE* 82–85, 108–12, 140–43 (2010); RITA J. SIMON AND DAGNY A. BLASKOVICH, *A COMPARATIVE ANALYSIS OF CAPITAL PUNISHMENT: STATUTES, POLICIES, FREQUENCIES AND PUBLIC ATTITUDES THE WORLD OVER* 35–36 (2002).

¹⁷⁵ *Cox*, 420 U.S. at 495.

was designed “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹⁷⁶ Speech on political issues is more than self-expression; it is the essence of self-government.¹⁷⁷ Such unfettered interchange is less important (and therefore may not warrant impingement on other interests) where party elites make all the important decisions behind closed doors with only minimal public involvement.

The *Melvin* decision illustrates how suppressing information about individuals can frustrate public debate and the consequent “bringing about of political and social changes desired by the people.” The producer of *The Red Kimono* was Dorothy Davenport Reid, the widow of actor Wallace Reid, who had died from an accidental drug overdose. Rather than squander her inheritance on luxuries, she responded to his death by producing “social conscience” films. Her first, appearing soon after her husband’s death, concerned narcotics addiction.¹⁷⁸

The *Red Kimono* was a proto-feminist production, created by an all-female team. Adapted from the short story of journalist Adela Rogers St. Johns by Dorothy Arzner, a lesbian who became a pioneer of women’s filmmaking, the film highlighted the social ills created by human trafficking. It portrayed Darley Melvin as more victim than villain, who ultimately redeemed herself rather than let the male protagonist save her. The film ended with her character’s pleading to the audience to give fallen characters a second chance in life — the very principle that *Melvin v. Reid* purported to establish.

Whatever the film’s artistic merit, it expressed a social commentary worthy of protection, which drew additional resonance from the film’s grounding in reality. The 1998 *Shulman* decision would recognize that “truthful detail” is “not only relevant, but essential to the narrative,”¹⁷⁹ and contemporary California might well have found that Darley Melvin’s challenge violated the state’s anti-SLAPP (Strategic Lawsuit Against Public

¹⁷⁶ *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), quoting *Roth v. United States*, 354 U.S. 476, 484 (1957).

¹⁷⁷ *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

¹⁷⁸ *OF HUMAN WRECKAGE* (1923).

¹⁷⁹ *Shulman v. Group W Prods., Inc.*, 18 Cal.4th 200, 230 (1998).

Participation) law.¹⁸⁰ Far from unnecessarily holding Darley Melvin up to scorn for no other reason than the pursuit of private profit, as the Court of Appeal characterized it,¹⁸¹ the film actually worked to protect women from sexual exploitation, and scorned the culture that victimized so many of them. But the Depression-era suit bankrupted Davenport Reid and forced her to sell her mansion. The outcome likely chilled similar socio-political commentary.

Recognizing that speech’s value often lies in the eye of the beholder, the United States Supreme Court has more recently rejected the “social value” test, favored by *Briscoe*, which weighs the benefits of speech with its costs:

The First Amendment itself reflects a judgment by the American people that the benefits of [protecting speech] outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.¹⁸²

But Continental law expressly authorizes courts to balance the value of free speech against other interests.¹⁸³ The Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms Article 10 (the European equivalent of the First Amendment) expressly recognizes individual “freedom of expression” but permits its restriction as necessary to protect “the reputation or rights of others,” as well as other competing priorities. Across the board, expression in Europe may be suppressed for a “pressing need” so long as the interference with expression is not “disproportionate to the legitimate aim pursued.”¹⁸⁴

Protecting honor is one such legitimate aim.¹⁸⁵ The “right to be forgotten’s” anti-embarrassment function manifests in German law criminally proscribing rude exchanges, which may include calling another

¹⁸⁰ CAL. CODE CIV. PROC., § 425.16.

¹⁸¹ *Melvin v. Reid*, 112 Cal. App. 285, 291–92.

¹⁸² *United States v. Stevens*, 559 U.S. 460, 470 (2010).

¹⁸³ *Enforcing Civility and Respect*, *supra* note 24, at 1381. The *Florida Star* court offered the possibility that “a state interest of the highest order” might justify suppression, but, due to the statute’s underinclusiveness, denied that even the physical safety of rape victims (who might be subject to retaliation) would qualify. *Florida Star*, 491 U.S. at 537–40.

¹⁸⁴ Council of Europe Publishing, *Human Rights Files*, No. 18, 9 (March 2007), [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf).

¹⁸⁵ *Enforcing Civility and Respect*, *supra* note 24, at 1381.

person a “jerk,” giving “the finger,” or failing to address the person with the proper honorific.¹⁸⁶ Although American law may suppress speech to prevent a legitimate threat of violence, it will not “provide a balm for wounded feelings”: “There is still, *in this country at least*, such a thing as liberty to express an unflattering opinion of another, however wounding it may be to the other’s feelings”¹⁸⁷ American law has essentially reified the maxim, “Sticks and stones may break my bones, but names will never harm me.”

Just as Europe limits speech to protect the status of individuals, it also limits speech to protect the reputations of groups.¹⁸⁸ The European Commission against Racism and Intolerance “strongly recommend[ed]” that the United Kingdom create an office for regulating the press and hearing complaints against “prejudicial reporting concerning their community.”¹⁸⁹ The report opposed media “stress” on the “Muslim background of perpetrators of terrorist acts” as harming a “vulnerable group[,]” and urged journalists to downplay or reject that background in favor of alternative explanations for terrorist acts, like mental illness.¹⁹⁰ Europe thus restricts speech that the First Amendment protects.¹⁹¹ The government in America may suppress a speaker who both intends and is likely to produce imminent unlawful action,¹⁹² but not speech seeking to make fun of immigrants, a ground that the European Court of Human Rights (ECHR) has found will justify criminal conviction.¹⁹³

Far from assuring an *unfettered* interchange of ideas to enable desired changes, Europe restricts “political advertising” to level the “playing field of debate” between viewpoints, even where such advertising does

¹⁸⁶ *Id.* at 1282–83, 1296–97, 1299.

¹⁸⁷ *Id.* at 1378, quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 59 (5th ed. 1984).

¹⁸⁸ Abrams, *supra* note 13, at 41–42.

¹⁸⁹ European Commission against Racism and Intolerance, *Report on the United Kingdom 22* (fifth monitoring cycle, 2016), https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/United_Kingdom/GBR-CbC-V-2016-038-ENG.pdf.

¹⁹⁰ *Id.*

¹⁹¹ Abrams, *supra* note 13, at 46.

¹⁹² *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁹³ Abrams, *supra* note 13, at 42; see *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 (2013). *Case of Feret v. Belgium*, Eur. Ct. H.R. 15615/07 (2009).

not concern specific candidates.¹⁹⁴ Noting that most European nations ban paid political advertising, the ECHR upheld a British ban against a challenge from an organization seeking better treatment for animals.¹⁹⁵ More recently, France prevented the airing of an advertisement conveying the humanity of children with Down Syndrome, as it might “disturb the conscience” of women who had aborted such children.¹⁹⁶

But America values the interchange of ideas so much that it protects speech that is disturbing, offensive, or even hurtful, so long as it concerns a matter of public import.¹⁹⁷ This import creates a public benefit to the exchange, which outweighs the hurtful effect on the subject.

But whereas America trusts private individuals to create an environment benefiting the public as a whole (e.g., through unfettered debate enriching democratic self-government), Europe looks to government to protect individuals (e.g., through suppressing speech causing the individual discomfort).¹⁹⁸ European balancing to preserve individual reputations has suppressed from public view many reports about events that could have fostered debate on public policy issues. These included reports about how:

- (1) a. Great Britain allowed entry to a Latvian despite his two prior convictions for raping women at knifepoint; b. he then abducted, sexually assaulted and fatally stabbed a 17-year-old girl; c. three years later, her traumatized younger sister committed suicide;
- (2) a Kosovo-born immigrant struggled against deportation;
- (3) people under 30 suffer from strokes;
- (4) a computer hacker shut down America’s largest port to avenge an insult;
- (5) a solicitor breached insider trading laws;

¹⁹⁴ *Case of Animal Defenders International v. United Kingdom*, Eur. Ct. H.R. 48876/08 (2013), at 7, quoting *On the Application of Animal Defenders Int’l v. Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

¹⁹⁵ *Animal Defenders International*, Eur. Ct. H.R. 48876/08 at 21–22.

¹⁹⁶ *France’s War on Anti-Abortion Speech: The government bans an ad showing happy children with Down Syndrome*, WALL ST. J., Nov. 30, 2016, <https://www.wsj.com/articles/frances-war-on-anti-abortion-speech-1480552815?mg=prod/accounts-wsj>. Other European nations have aired the advertisement, and the ECHR has not yet ruled on it.

¹⁹⁷ *Snyder v. Phelps*, 562 U.S. 443, 454, 459 (2011).

¹⁹⁸ King, *supra* note 14, at 190–191.

- (6) a woman used Rohypnol to drug (and then rob) wealthy men;
- (7) an Austrian family court denied a British woman even partial custody of her twins despite social workers' concerns about her estranged husband's violent and unpredictable behavior;
- (8) a lawyer who had requested to work for her law firm part-time won a claim for unfair dismissal;
- (9) closed circuit television filmed a police officer assaulting a man;
- (10) three men who refused a police demand to stop were transporting explosives in their car, and more were found in their homes;
- (11) a pensioner's corpse lay undiscovered for nearly six months.¹⁹⁹

All of these articles could foster a meaningful interchange of ideas leading to desirable political and social changes. Most obviously, (1) could foster debate about (a) immigration policy (as could (2)); (b) public safety; and (c) teenage suicide and the indirect crime on victims' families. Articles (3) through (6) could alert the public about certain dangers and enable self-protection against these diverse harms. Articles (7) and (8) could prompt debate on public issues like domestic violence, divorce and child custody, and balancing parenthood and employment. Articles (9) and (10) could foster debate about police, including their willful misconduct and the dangers produced by fleeing motorists. And (11) could lead to greater protection of the elderly and encourage the public to articulate concerns or suspicions (of all kinds) rather than suppress them as probably meaningless.

The disparate scope of Europe's right to be forgotten is not *sui generis* but part of the broader paternalism underlying European law. Part I described how America trusts its people to defend themselves in court and defend their dignity outside it, whereas Europe more aggressively protects individuals from their own improvidence. Part II showed how the U.S. has moved away from a rehabilitative penology, which spares individuals from the full consequences of their improvident criminal conduct, and toward a retributive model of justice. Part III showed how American law trusts jurors with information about defendants' pasts, unlike Europe, which does

¹⁹⁹ Rhiannon Williams, *Telegraph stories affected by EU "right to be forgotten,"* THE TELEGRAPH, Sep. 3, 2015, <http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html>.

not generally empanel juries at all. And Part IV reviewed how the United States protects a far greater range of speech to foster civic self-government, whereas Europe suppresses more speech to shield individuals from offense and discomfort. Accordingly, whereas California offers minors the opportunity to remove unwanted content from the internet, Europe offers this protection to adults as well.

Europe ultimately treats its adult citizens as paternalistically as the United States treats minors — if not more so. The United States Supreme Court has observed that minors have “[a] lack of maturity and an underdeveloped sense of responsibility” which “often result in impetuous and ill-considered actions and decisions.”²⁰⁰ Minors’ reduced capacity for *personal* self-government shields them from the consequence of capital punishment.²⁰¹ But it also excludes them from *civic* self-government, as they do not serve on a jury or vote.²⁰² European law extends these consequences to adults, as they are exempt from capital/retributive punishment, and there is no right in Continental Europe to serve on (or be judged by) a jury. Although European adults vote, they have less influence over public policy than the American electorate.²⁰³ In fact, adult criminal defendants in Europe are deemed insufficiently responsible to represent themselves or be punished with life imprisonment without possibility of parole, both of which are available to American minors. Part V will explore the roots of this paternalism.

V. THE ROOTS AND CONSEQUENCES OF EUROPEAN PATERNALISM

When Anthony Faretta asked to represent himself, the court advised him of what he could expect.

You are going to follow the procedure. You are going to have to ask the questions right. If there is an objection to the form of the question and it is properly taken, it is going to be sustained. We are going to treat you like a gentleman. We are going to respect you. We are

²⁰⁰ *Roper v. Simmons*, 543 U.S. 551, 579 (2005), quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993).

²⁰¹ *Roper*, at 578.

²⁰² *Id.* at 569.

²⁰³ See Beale, *supra* note 167, at 474–75; see also Kleinfeld, *supra* note 73, at 989–90.

going to give *you* every chance, but *you* are going to play with the same ground rules that anybody plays. And *you* don't know those ground rules. *You* wouldn't know those ground rules any more than any other lawyer will know those ground rules until he gets out and tries a lot of cases. And *you* haven't done it.²⁰⁴

This admonition would not occur on the European Continent, where criminal defendants have no such right to represent themselves.²⁰⁵

But the universal use of the second-person pronoun “you” also manifests Anglo-American exceptionalism; Continental European nations use two different pronouns for the second person.²⁰⁶ Though it may not cause the competing legal cultures, in which Americans choose to be masters of their fate and Europeans seek protection from their own improvidence, it does much to explain them.

A. IT'S ALL ABOUT YOU

The dual use of the second-person pronoun began in the fourth century, when Latin, which had used *tu* (*T*) exclusively, developed the plural *vos* (*V*) for speech directed toward the emperor.²⁰⁷ It was eventually extended toward other elite figures to reflect asymmetrical power relationships: the nobility used *T* toward commoners and received *V* from them, masters used *T* to servants and received *V*, parents used *T* to their children and received *V*, while social equals used the same pronoun with each other.²⁰⁸ This *T-V* contrast extended to other languages including French (*tu* and *vous*), Italian (*tu* and *voi*, later *Lei*), German (*du* and *ihr*, then *er*, and then

²⁰⁴ *Faretta v. California*, 422 U.S. 806, 808 n.2 (1975) (italics added).

²⁰⁵ Jorgensen, *supra* note 15, at 711, 714–17.

²⁰⁶ According to the World Atlas of Language Structures, the only European nations whose primary language has only one second-person pronoun are England, Ireland, and Albania. WORLD ATLAS OF LANGUAGE STRUCTURES ONLINE, <http://wals.info/feature/45A#2/23.2/148.5>.

²⁰⁷ Roger Brown & Albert Gilman, *The Pronouns of Power and Solidarity*, in *STYLE IN LANGUAGE* (T.A. Sebeok ed. 1960) 252, 254.

²⁰⁸ *Id.* at 255; Catherine A. Maley, *The Evolution of a French Plural of Respect*, 15 *ROMANCE NOTES* 192 (1973); Joseph Williams, “O! When Degree is Shak'd” *Sixteenth-Century Anticipations of Some Modern Attitudes Toward Usage* 69, 90, in *ENGLISH IN ITS SOCIAL CONTEXTS: ESSAYS IN HISTORICAL SOCIOLINGUISTICS* (Machan and Scott eds. 1992).

Sie), Spanish (*tú* and *vos*, later *usted*), Portuguese (*tu* and *vos*, later *você*), Russian (*ty* and *vy*).²⁰⁹

English did not follow this dual usage. Although the Norman Conquest imported the French practice,²¹⁰ England was less rigid about social hierarchy. Medieval and Early Modern English texts show frequent shifts between *T* and *V* usage, often in the same statement, with the pronoun determined more by the *content* of the speech than the *status* of the speaker.²¹¹ The respectful *you* began as the exception in English and became the rule by the sixteenth and seventeenth century,²¹² by which time the use of *thou* to a non-intimate of equal rank was considered rude.²¹³

The permeability of social class fostered this trend: skilled craftsmen became merchants, and successful merchants became gentlemen, often through educational achievement.²¹⁴ Elizabethan England needed a growing bureaucracy to manage the Church and commercial life, so universities recruited intelligent commoners, who, once graduated, became “gentlemen by achievement.” On the other hand, the younger sons of gentlemen, excluded from land ownership through primogeniture, often served as apprentices to artisans. This fluid culture produced numerous interactions where a speaker would not know his listener’s status. The desire to avoid giving offense led to a broader use of *you* with unfamiliar people (regardless of their actual status).²¹⁵

The relative egalitarianism and social mobility shaped political trends; Parliament demanded greater distribution of political authority while

²⁰⁹ Brown & Gilman, *supra* note 207, at 254–55, 257; Maley, *supra* note 208, at 188; Williams, *supra* note 208, at 90.

²¹⁰ KATIE WALES, PERSONAL PRONOUNS IN PRESENT-DAY ENGLISH 74 (1996).

²¹¹ *Id.* at 75; Brown & Gilman, *supra* note 207, at 278. It was more common in English than European languages for a speaker to use *T* to show contempt, even to a social superior. Brown & Gilman, *supra* note 207, at 278; Wales, *supra* note 210, at 75.

²¹² TERRY WALKER, *THOU AND YOU IN EARLY MODERN ENGLISH DIALOGUES* 40 (2007).

²¹³ *Id.*

²¹⁴ Williams, *supra* note 208, at 79.

²¹⁵ WALKER, *supra* note 212, at 43; Williams, *supra* note 208, at 86, 91. The upwardly mobile tended to use *you* with each other, adopting the norms of the upper class to which they aspired. WALKER, at 43; WALES, *supra* note 210, at 76.

royal absolutism held sway in France and Spain.²¹⁶ English immigrants to the New World were even more predisposed to an egalitarian, democratic culture. The immigrant cohort was “middle-class,” insofar as the aristocratic elite declined to immigrate and forfeit the advantages they enjoyed in England; also staying at home were those at the bottom, who lacked the means (or confidence) to make the voyage.²¹⁷

The general availability of land transformed the social environment. Widespread land ownership created a very different socioeconomic structure than existed in Europe. Instead of a small “V” minority owning the land on which a large “T” majority worked, most American colonists owned their own land and were responsible for its development.²¹⁸ Near-universal land ownership produced a much broader governing community than existed in Europe.²¹⁹

It was in America that the institution of trial by jury (of *you*-class peers) permanently expanded protection for truthful speech. Eighteenth-century governments routinely proscribed criticism of government officials, and defendants could not justify their statements by citing truth as a defense. But when John Peter Zenger asserted that his criticisms of New York Governor William Cosby were true and the jury refused to convict, it created *de facto* protection for truthful speech needed for self-government.

By the late nineteenth century, European usage began to distinguish *T* from *V* based more on distance than status.²²⁰ Speakers began using *V* with a stranger and *T* with an intimate, so an employer will now more

²¹⁶ JOHN HARMON MCELROY, *AMERICAN BELIEFS* 180–81 (1999). England’s colonization of the United States developed very differently from France’s colonization of Canada, Portugal’s colonization of Brazil, and the Spanish colonization of Latin America. The U.S. developed a heterogenous population, responsible for its own defense and, increasingly, governance, and reflected less of a binary *T-V* dynamic with the mother country than did the French, Portuguese and Spanish colonies. *Id.* at 32–34.

²¹⁷ JOHN HARMON MCELROY, *FINDING FREEDOM* 44 (1989). New England had an even higher rate of literacy than England, further facilitating self-government. DAVID HACKETT FISHER, *ALBION’S SEED* 130–31 (1989).

²¹⁸ *AMERICAN BELIEFS*, *supra* note 216, at 46.

²¹⁹ Political influence in eighteenth-century America was hardly well-distributed by contemporary American standards, with African Americans and women excluded from the franchise. But it was very well distributed compared to eighteenth-century France, where no one but the king had a meaningful vote.

²²⁰ Brown & Gilman, *supra* note 207, at 258–60.

likely use *V* with an employee, and even high-status brothers will use *T* with each other. The usage reflects an English preference for distance; no other European language has an equivalent word for “privacy,” and the very concept reflects a uniquely Anglo-Saxon value.²²¹

Just as “you” creates equality among individuals, it creates distance.²²² In contrasting what he deemed the “European Dream” with its American counterpart, Jeremy Rifkin characterized Americans as finding freedom in independence, created through self-reliance and autonomy, whereas Europeans find freedom in the embeddedness of many interdependent relationships.²²³ The language corresponds to Professor Whitman’s description of privacy priorities: Americans seek a private sovereignty with which to interact as equals in arm’s-length transactions, whereas Europeans seek empathic treatment (and protection from shame) from the powers that be.²²⁴

Europe’s right to be forgotten and California’s Eraser Law manifest the contrasts between European paternalism and American egalitarianism (the former *T-V* distinction) and between European embeddedness/interdependence and American self-reliance/independence (the contemporary *T-V* distinction). The CJEU (the hyper-elite *V*-class) created the right to suppress truthful information, the judiciary determines when and how the right applies in individual cases, and these elites protect everyone; it is not just minors who are deemed to need state protection. On the other hand, the Eraser Law is the product of a democratic process involving a wider range of decisionmakers, who are trusted to manage both their personal and communal

²²¹ ANNA WIERZBICKA, *CROSS-CULTURAL PRAGMATICS: THE SEMANTICS OF HUMAN INTERACTION* 47 (2003).

²²² *Id.* This linguistic distance pervades everyday life, as English speakers are more reserved physically, and less likely than other Europeans to kiss, hug, or touch in public interactions. Suvilheto et al., *Topography of social touching depends on emotional bond between humans*, 112 *PROCEEDINGS OF NATIONAL ACADEMY OF SCIENCES* 13811, 13814 (2015), <https://pdfs.semanticscholar.org/53e6/1ce334dcf8f9252e2b9a8f7112fd10d19bd2.pdf>.

²²³ Jeremy Rifkin, *The European Dream*, *UTNE READER* (Sept./Oct. 2004), <https://www.utne.com/community/the-european-dream>.

²²⁴ The disparate natures of the American and French Revolutions explain some of the difference. Americans wanted distance (from English authority) and created a limited government model where people could exercise sovereignty in their own private space. The French Revolution, by contrast, opposed exploitation and oppression of the lower class by the upper class. Its political goals involved less the prevention of governmental *intrusion* than *mistreatment* by other private parties.

affairs. The American law furthers self-determination rather than embeddedness, by granting minors a unilateral right to delete information without permission from the governing class. But California allows the user to delete only her own autonomous speech, and not to suppress anyone else's, whereas Europe enforces the subject's right to suppress the speech of others to preserve her face in embedded interdependent relationships.

B. THE CONSTITUTIONAL CONSEQUENCES OF *NOBLESSE OBLIGE*

Pronoun use symbolizes the status of each population. Insofar as there is a trend to reduce social hierarchy and use a single pronoun in Europe, it is toward the universal use of the informal (*T*),²²⁵ a policy Mussolini had tried to impose on Italians.²²⁶ The United States, by contrast, lacking the feudal ethos that shaped European legal and political norms,²²⁷ has universalized the “adult” form. American (and, to a lesser extent, British) norms reflect a very different set of assumptions about the electorate and its capacity for self-government.

Contemporary European norms, developed by *V*-class elites with minimal involvement from the rest of the population, reflect the continuing influence of *noblesse oblige*. These norms purport to benefit the *T*-class, but also privilege the *V*-class and preserve its ultimate authority.

For example, Europe has outlawed permanent punishment, whether capital or “whole life” imprisonment (without possibility of parole) through the authority of judicial elites. The European Court of Human Rights recalled the conclusion of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which deemed it “inhuman to imprison someone for life with no hope of release.”²²⁸ Europe likewise insists that rehabilitation form the centerpiece of penology and bars punishment where it serves only retributory purposes.²²⁹

²²⁵ Janet Morford, *Social Indexicality in French Pronominal Address*, 7 J. OF LINGUISTIC ANTHROPOLOGY 3 (1997); Christina Bratt Paulston, *Pronouns of Address in Swedish: Social Class Semantics and a Changing System*, 5 LANGUAGE AND SOC'Y 359 (1976).

²²⁶ *Enforcing Civility and Respect*, *supra* note 24, at 1329 n.152.

²²⁷ *Id.* at 1285, citing LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 4 (1955).

²²⁸ *Case of Vinter and Others v. United Kingdom*, Eur. Ct. H.R. 66069/09 23 (2013).

²²⁹ *Id.* at 34, 41.

Although presented in terms of solicitude for unfortunates who have suffered conviction for the most aggravated form of murder, repeated surveys have shown that the *T*-class supports permanent punishment far more than the *V*-class.²³⁰ The most obvious explanation is that the *T*-class suffers the most from crime, and thus favors more severe punishment for their own protection.²³¹

But protection from punishment is a double-edged sword. The exercise of Continental mercy traditionally served not so much to relieve the convict as to magnify royal authority through a “pure display of sacral sovereignty and hierarchical order.”²³²

European criminal law likewise aggrandizes *V*-class authority: trial decisions are made by counsel, not the defendant, guilt is determined by a judge, not jury, and the public has little voice in sentencing policy. The scientific school’s conceptualization of citizens as children can justify their exclusion from basic tasks of self-government:

To be “cured” against one’s will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we “ought to have known better,” is to be treated as a human person made in God’s image.²³³

²³⁰ *Attitudes toward the EU*, Chatham House - Kantar Public Survey (2017), <https://www.chathamhouse.org/publication/future-europe-comparing-public-and-elite-attitudes>; Ipsos MORI, *Death Penalty Drama* (2009), <https://www.ipsos.com/ipsos-mori/en-uk/survey-channel-4-attitudes-towards-death-penalty>.

²³¹ See *Glossip v. Gross*, 135 S.Ct. 2726, 2749 (2015) (Scalia, J., concurring):

[W]e federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are not confronted with the threat of violence that is ever present in many Americans’ everyday lives. The suggestion that the incremental deterrent effect of capital punishment does not seem “significant” reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental deterrence is appropriate.

²³² HARSH JUSTICE, *supra* note 9, at 144, 165.

²³³ C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1953).

Like parents guiding children, Europe's governing elite denies its general population *responsibility* in both senses of the word. The general population does not face full *accountability* through retributive punishment, but also lacks the *opportunity* to participate meaningfully in policy decisions, which are essentially reserved for the elite. The United States offers a different bargain to its *you*-class. It deems its members capable of *personal* self-government: they can shape their conduct before trial, by choosing the conduct determining their sentence, and during trial, by either representing themselves or determining their defense with counsel. And it deems them capable of *civic* self-government: they can serve on juries and determine sentencing policy. Tocqueville observed how jury service bridges the *T-V* chasm and raises the *T* class to the "*you*" class, which governs itself:

He who punishes the criminal is therefore the real master of society. Now, *the institution of the jury raises the people itself . . . to the bench of judges*. The institution of the jury consequently invests the people . . . with the direction of society.²³⁴

European speech restrictions reflect a comparable exercise of *V*-class authority. German law proscribing insults developed to guarantee deference to high-status individuals, and it still enforces the right to receive the correct pronoun: the high-status (*V*) address of *Sie*.²³⁵ French insult law also developed to protect from criticism the government generally and police specifically.²³⁶ Calling a German officer a "blockhead" or "idiot with a badge" may result in a fine of over one thousand dollars,²³⁷ but in the U.S., "criticism of the police is not a crime" even to the point of profanity.²³⁸ "The freedom of individuals verbally to oppose or challenge police

²³⁴ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 287 (H. Reeve transl., rev. ed. 1900). Although the democratic procedures of self-representation and jury service have distinguished the United States from Europe over time, professionalization of the bar (and bench) has also limited Americans' opportunity for self-government in an absolute if not relative sense. *See, e.g., Faretta v. California*, 422 U.S. 806, 820–32 (1975).

²³⁵ *Enforcing Civility and Respect*, *supra* note 24, at 1297, 1316. German law provides special protections from criticism to groups based on their status, including the judiciary, members of the armed forces, and bank officers. *Id.* at 1311, n.87.

²³⁶ *Id.* at 1350, 1354–55.

²³⁷ As of 2000, the fine was up to 3,000 (pre-Euro) Deutschemarks. *Id.* at 198 n.52.

²³⁸ *Velazquez v. City of Long Beach*, 793 F.3d 1010, 1019–20 (9th Cir. 2015), quoting *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377 (9th Cir. 1990); *see also* Johnson

action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”²³⁹ It is no coincidence that Germany’s group insult law derives from a 1934 prosecution for criticizing the SS and SA, Hitler’s paramilitary organizations.²⁴⁰ Though there may be increasingly few who would benefit from suppressing such information, the text of *Google Spain*, empowering courts to censor information deemed to have been “kept for longer than is necessary,” could be cited by an aging collaborator seeking to have his crimes “forgotten.” The conclusion of Germany’s highest court in the *War Criminal* case, that courts should consider the “personality, state of mind, and age of the person,” and not emphasize too heavily the gravity of the crime²⁴¹ suggests the new right could apply to such cases.

Defamation law substantially restricts speech in Europe, and the *V* class benefits most from these limits. Notwithstanding her humble origins, Gabrielle Darley Melvin’s successful suppression of social criticism resembled that of aristocrats and governmental officials who have used (or threatened) litigation to suppress challenging speech. Most recently, Vladimir Putin’s threat of a libel suit convinced Cambridge University Press (CUP) to drop a book by Karen Dawisha on Putin’s gangster connections.²⁴² The publisher attributed the decision to speech-restrictive British libel law, which forces a speaker to prove a statement’s truth, in contrast to the speech-protective American standard, established in *New York Times v. Sullivan*,²⁴³ which forces the plaintiff to prove the statement’s falsity (as well as malice where the subject is a public figure).²⁴⁴ CUP informed Professor Dawisha that even a successful defense would prove too costly to

v. Bay Area Rapid Transit Dist., 724 F.3d 1159, 1174 (9th Cir. 2013). The author briefed and argued *Velazquez* before the Ninth Circuit.

²³⁹ *City of Houston, Texas v. Hill*, 482 U.S. 451, 462–63 (1987).

²⁴⁰ *Enforcing Civility and Respect*, *supra* note 24, at 1328.

²⁴¹ *War Criminal* case, 72 [BVerfGE] 105 (1986), *quoted in* Case of Vinter and Others v. United Kingdom, Eur. Ct. H.R. 66069/09 28 (2013).

²⁴² Abrams, *supra* note 13, at 51; *A book too far: A controversial book goes unpublished*, THE ECONOMIST, Apr. 3, 2014, <https://www.economist.com/blogs/easternapproaches/2014/04/russia>.

²⁴³ 376 U.S. 254, 269 (1964).

²⁴⁴ *A book too far*.

justify publication.²⁴⁵ She published her book in the United States without legal challenge.²⁴⁶

Defamation can also create criminal liability throughout Europe. Every European Union member (except Cyprus, Estonia, Ireland, Romania, and the United Kingdom) maintains criminal defamation statutes, and 20 of those 23 nations (except Bulgaria, Croatia, and France) authorize imprisonment as a possible penalty.²⁴⁷ Many of those nations, including France and Germany, impose more severe punishment for speech directed at governmental officials,²⁴⁸ unlike American law, which provides greater *protection* to criticism of public officials.²⁴⁹

Other disparities between European and American speech law described in Part IV likewise reflect formal protections for the *T* class (based on paternalistic estimates of their capacity for self-government) which also benefit the *V* class. Censoring the identity of terrorists (or offering alternative explanations for their crimes, whether true or not)²⁵⁰ paternalistically presupposes that the public will not use truthful information to engage in an informed debate about immigration policy but will misuse it to engage in retaliatory violence against innocent immigrants or Muslims.²⁵¹ The ECHR justified restricting speech critical of immigration due to the risk that “less knowledgeable members of the public” might come to distrust

²⁴⁵ *Id.*

²⁴⁶ ABRAMS, *supra* 13, note at 51.

²⁴⁷ Organization for Security and Co-operation in Europe, The Representative on Freedom of the Media Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (March 2017), <http://www.osce.org/fom/303181?download=true>.

²⁴⁸ The Committee to Protect Journalists, *Balancing Act: Press Freedom at Risk as EU Struggles to Match Action with Values* 16 (2015), https://cpj.org/reports/cpj_eu_special_report_2015.pdf. Wealthy private citizens also benefit disproportionately from restrictive speech laws. See John Kampfner, *The Worrying Rise of the rich man's weapon of justice*, THE INDEPENDENT, Mar. 31, 2011, <http://www.independent.co.uk/voices/commentators/john-kampfner-the-worrying-rise-of-the-rich-mans-weapon-of-justice-2258869.html>.

²⁴⁹ *Gertz v. Welch*, 418 U.S. 323, 342–44 (1974).

²⁵⁰ The relative insignificance of truth in the debate recalls the European goal of protecting “honor justly or unjustly acquired.” *Two Western Cultures*, *supra* note 9, at 1179, quoting ÉMILE BEAUSSIRE, *LES PRINCIPES DU DROIT* (1888) (emphasis added). Both explain why truth is an inadequate justification for disclosure according to *Google Spain*.

²⁵¹ See *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002).

immigrants.²⁵² The censorship promises to protect vulnerable immigrants from violence but also protects governmental elites from critical scrutiny of immigration policy.

The status quo likewise enjoys immunity from challenge due to laws barring advertising on public policy issues. Commercials could present animals in assertedly inhumane conditions but Animal Defenders International could not air comparable commercials calling attention to that issue. Again, a paternalistic assumption about *T*-class rationality justified the ban: the “potential mischief” of political advertising lay in the risk that the public would, in Pavlovian fashion, embrace certain ideas “not because they are shown in public debate to be right but because, by dint of constant repetition, the public has been conditioned to accept them.”²⁵³ Though the United Kingdom justified the law as needed to level the playing field so the wealthy would not dominate public debate, the law effectively eliminates the field of debate altogether — and freezes in place established policies and practices.

That policy contrasts sharply with the American constitutional tradition, which provides more protection to speech about public figures than private, and provides greater protection to speech about public policy than commercial products.²⁵⁴ The U.S. provides a level playing field by granting the citizen-critic the same legal standing to speak as the government official, because “[i]t is as much his duty to criticize as it is the official’s duty to administer.”²⁵⁵ And the Court leveled the playing field not by banning political speech but by protecting it:

It would give public servants *an unjustified preference over the public* they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.²⁵⁶

²⁵² Case of Féret v. Belgium, Application, Eur. Ct. H.R. 15615/07 (2009). The irony of a judicial decision forbidding speech to prevent “mistrust” of immigrants, which itself derives from mistrust of the European public, was apparently lost on the ECHR.

²⁵³ On the Application of Animal Defenders Int’l v. Secretary of State for Culture, Media and Sport [2008] UKHL 15, *quoted in* Case of Animal Defenders International v. United Kingdom, Eur. Ct. H.R. 48876/08 7 (2013).

²⁵⁴ See *Expressions Hair Design v. Schneiderman*, 137 S.Ct. 1144, 1152 (2017) (Breyer, J., concurring.)

²⁵⁵ *New York Times v. Sullivan*, 376 U.S. 254, 282 (1964).

²⁵⁶ *Id.* at 282–83 (emphasis added).

If an American advertiser may treat animals inhumanely, another advertiser may object. Accordingly, where the *Google Spain* decision empowered courts to determine whether posted content is adequate, relevant, or excessive, the First Amendment assigns that determination to the public: “[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.”²⁵⁷ Rejecting the *noblesse oblige* model, in which the *V* class protects the *T* class, every American equally must decide for himself, “every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”²⁵⁸

Although the U.S. Supreme Court has never faced the *Google Spain* question of whether the state may censor truthful speech to save the subject from embarrassment, its decision in a case about *false* speech leaves no doubt about how it would rule. Xavier Alvarez falsely claimed to have won the Congressional Medal of Honor, and the government prosecuted him criminally for the lie.²⁵⁹ The Court decided that private shaming, “the dynamics of free speech, of counterspeech, of refutation,” rather than governmental punishment should correct the lie and deter future mendacity.²⁶⁰ A self-governing people could solve the problem without the coercive hand of government: “Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.”²⁶¹ Far from shielding Alvarez from online ridicule, the Supreme Court celebrated how private citizens had become their own watchmen for truth: “[T]he outrage and contempt expressed for respondent’s lies can serve to reawaken and reinforce the public’s respect for the Medal, its recipients, and its high purpose.”²⁶²

In endorsing private criticism of Alvarez’s reputation but precluding state-imposed punishment, the U.S. Supreme Court squarely rejected the

²⁵⁷ *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

²⁵⁸ *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring opinion). As the government may not separate “true” from “false,” a fortiori, it may not separate “adequate” from “inadequate,” or “relevant” from “irrelevant.”

²⁵⁹ *Id.* at 713.

²⁶⁰ *Id.* at 726–27.

²⁶¹ *Id.* at 729.

²⁶² *Id.*

Briscoe–Lebach model, in which state-imposed punishment is the exclusive remedy for misconduct, and informal, private sanctions are forbidden. *Alvarez* concluded that truth does not need handcuffs or a badge, but *Google Spain* appeared to endorse the *Lebach* holding that it does. The divergence on this issue reflects the fundamental contrast: the United States tends to trust the (*you*-class) public but not the government, whereas the European Union trusts the (*V*-class) government more than its (*T*-class) people.²⁶³

VI. THE FUTURE OF RETRIBUTIVE SPEECH

The law mostly uses the term “retribution” in the penal context, and it is commonly associated with harsh, mean treatment. But it literally means “pay back,” and it undergirds any culture where one receives treatment according to her conduct rather than birth, race, or any other status-related condition. In the 1970s, both the California Supreme Court and Germany’s Constitutional Court shared a commitment to the rehabilitation imperative, and both ruled against disclosure of past crime to enable the criminal’s restoration to his former standing in the community.²⁶⁴ Since then, the United States (and California) have returned to the retributive model for punishment — and speech.

To pay back for conduct, good or bad, requires knowledge of it. To judge neighbors on the content of their character rather than the color of their skin requires information with which to evaluate that character. The same retribution that supports punishment of wrongdoing supports reward for doing right.

Continental Europe did not join in the return to retributivism, a model of treating others based on conduct rather than status:

Europeans are not yet ready for a world in which *acts* matter so much more than *persons* — for a world in which the consequences that befall you depend so much on *what you do* rather than *who you are*.²⁶⁵

²⁶³ King, *supra* note 14, at 191.

²⁶⁴ *Briscoe*, 4 Cal.3d 529 (1971); *Lebach* case, 35 BVerfGE 202 (1973).

²⁶⁵ Harsh Justice, *supra* note 9, at 94.

Anthony Faretta symbolized the contrary ethos. Though lacking status as a lawyer, the court promised he would be treated with “respect,” “like a gentleman.”²⁶⁶ But he would receive the same treatment as any credentialed attorney; his success would depend on his own conduct.

Conduct-based treatment works to the detriment of those who have committed serious crimes by allowing severe punishment. It likewise permits speech enabling the public to learn of past misconduct. Retributive speech thus lowers wrongdoers in public standing, and those with the highest standing have the most to lose.

But it enables others to rise according to their favorable conduct. Ever since medieval and early-modern English speakers used *T* (thou) or *V* (you) based on the content of the speech (including the speaker’s contempt for the listener) rather than the listener’s status,²⁶⁷ the English-speaking world has tended toward a *relative* meritocracy compared to Continental Europe, where the law protected the status of high-ranking individuals, regardless of the *origins* of such rank.²⁶⁸ Of course, eighteenth-century Anglo-American norms were hardly meritocratic by contemporary standards, but the English at least celebrated the *ideal* of equal justice (however unrealized in practice), as Continental elites did not.²⁶⁹ Judgment based on conduct offered the possibility that English commoners could become “gentlemen by achievement.”²⁷⁰ But this conversely entails that others could become “common by vice.”

²⁶⁶ *Faretta v. California*, 422 U.S. 806, 808 n.2.

²⁶⁷ See WALES, *supra* note 210, at 75; Brown & Gilman, *supra* note 207, at 278.

²⁶⁸ See *Two Western Cultures*, *supra* note 9, at 1179, quoting EMILE BEAUSSIRE, *LES PRINCIPES DU DROIT* (1888) (emphasis added): “[P]rying and insults . . . violate the law when they tend to destroy, through public revelation . . . honor justly or *unjustly acquired*.”

²⁶⁹ Blackstone boasted, “And it is moreover one of the glories of our English law, that the nature, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has before ordained, for every subject alike, without respect of persons.” 4 WILLIAM BLACKSTONE, *COMMENTARIES* *370–71, *quoted in* HARSH JUSTICE, *supra* note 9, at 41–42. The English hanged murderers regardless of their status, whereas Continental aristocrats convicted of murder received what was considered the higher-status punishment of beheading. HARSH JUSTICE, *supra*, at 103, 153–58.

²⁷⁰ Williams, *supra* note 208, at 79.

Americans (and, to a lesser extent, Britons) continue to perceive their conduct plays a greater role in their eventual success than do Europeans, who incline more to the determinism underlying the scientific school of criminology, which the United States abandoned in the 1970s. A 2002 Pew survey asking why some people “don’t succeed in life” found Americans were far less likely than German, Italian, or French respondents to attribute non-success to “society’s failure” rather than their own “individual failures” (with the British in the middle).²⁷¹ Similarly, six times this century Pew has asked whether “[s]uccess in life is pretty much determined by forces outside our control.”²⁷² Not once in the twelve combined times they have been asked has a plurality of Americans (or Britons) agreed with this deterministic premise.²⁷³ Pew has asked the French, Germans, Italians, and Spanish about this premise a combined twenty-one times, and not once has a plurality denied it.

These contrasting perceptions may be self-reinforcing. The belief that misconduct is not really the individual’s fault may lead to a broad “right to be forgotten” that suppresses such information. But the absence of such information may further disconnect reward from desert. A homeowner recruiting candidates for a contracting job may seek to learn about their past conduct, and hire the one with the best record. But if no meaningful information is available (because the “right to be forgotten” censors any negative reports, and everyone enjoys a “false aura” of favorability), the homeowner may rely instead on personal connections for recommendations, which will tend to disadvantage people with minimal connections — thereby further diminishing the import of personal merit.

The very “protection” offered by *Google Spain*, shielding from the public an individual’s past difficulty in paying debts, harms the aspiring *T*-class most of all. European law restricts access to individuals’ credit

²⁷¹ Pew Research Center, *What the World Thinks in 2002: How Global Publics View Their Lives, Their Countries, The World, America*, Question 36 (2002), <http://www.pew-global.org/2002/12/04/what-the-world-thinks-in-2002>.

²⁷² Pew Research Center, *Topline Results, Spring 2014 Survey*, Question 13b, 38, <http://www.pewglobal.org/files/2014/07/2014-07-14-Balance-of-Power-Topline.pdf>.

²⁷³ *Id.* The contrast is a relative one, as usually at least one-third of Americans assert the determinist position, and at least one-third of Europeans assert the non-determinist position.

history far more than American law.²⁷⁴ Credit is thus much less accessible in Europe,²⁷⁵ and it is not the *V*-class who suffer from tight credit.

Supporters of the expansive European right may celebrate that it weakens the historical *T-V* dichotomy: in centuries past only the *V* class could protect itself against unfavorable speech (whether true or not), but the aristocratic privilege now extends to everyone.²⁷⁶ As one commentator celebrates this promise: “whereas there were once masters and slaves, now ‘you shall all be masters.’”²⁷⁷ But universalizing the censoring power minimizes the capacity of speech to alter the status quo, freezing in place the social hierarchy. If one defines a “master” as having the ability to speak truthfully about others without fear of a defamation suit, and a “slave” as lacking that ability, the European trend could be described as rendering everyone (outside the government) a slave. Limits on speech are limits on social change and mobility.

Americans instead idealize the absence of the *T-V*, master–slave dichotomy altogether, aspiring to (if not fully achieving) its negation as described by Abraham Lincoln: “As I would not be a slave, so too I would not be a master. That is my idea of democracy.”²⁷⁸ Though there were slaves (and masters) in nineteenth-century America, the nation is moving closer to the ideal of a participatory democracy in which everyone is a self-governing *you*, able to represent herself in court, serve on a jury, and have a meaningful vote on public policy. This adult *you* status also entails being subject to retributive punishment and speech. This status also trusts members of the public with information, because they will use and not abuse it, and accord past misdeeds proper rather than excessive weight.²⁷⁹ Every American, and not only judges, can be a watchman for truth and decide whether information is relevant or necessary.

²⁷⁴ *Two Western Cultures*, *supra* note 9, at 1190–92.

²⁷⁵ *Id.* at 1192.

²⁷⁶ *Id.* at 1166.

²⁷⁷ *Id.*, quoting PHILIPPE D’IRIBARNE, *VOUS SEREZ TOUS DES MAITRES!: LA GRANDE ILLUSION DES TEMPS MODERNES* (1996).

²⁷⁸ See *Enforcing Civility and Respect*, *supra* note 24, at 1285 (contrasting the European ethos of “*we are all aristocrats now*,” with the American ethos of “*there are no more aristocrats*”).

²⁷⁹ *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002).

The debate over the international reach of *Google Spain*, and the competing claims of the First Amendment, will weigh the value of retributive speech, and the outcome of that debate is uncertain. Americans’ commitment to the unfettered exchange of ideas is diminishing with each generation, and more than three times as many “millennials” as senior citizens favor a governmental ban on speech that is offensive to minority groups,²⁸⁰ although American millennials remain more speech-protective than the overall populations of all surveyed European nations except the United Kingdom.²⁸¹ Millennials may be more comfortable with a paternalistic model, as they form the first generation of adults with more members living with parents than a spouse.²⁸²

On the other hand, the United Kingdom’s looming exit from the European Union may provide the United States with an influential ally in the international debate over retributive speech. The United Kingdom has been critical of the “censorship” authorized by *Google Spain*.²⁸³ As a House of Lords report concluded, “We do not believe that individuals should have a right to have links to accurate and lawfully available information about them removed, simply because they do not like what is said.”²⁸⁴ The UK likewise refused a Continental call to create a watchdog organization to censor speech about terrorism.²⁸⁵ Anglophonic Britain likewise shares

²⁸⁰ Pew Research Center, *40% of Millennials OK with limiting speech offensive to minorities*, Nov. 20, 2015, http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/ft_15-11-19_speech.

²⁸¹ *Id.* The surveyed Continental European countries were Germany, Italy, Poland, France and Spain.

²⁸² Pew Research Center, *For First Time in Modern Era, Living With Parents Edges Out Other Living Arrangements for 18- to 34-Year-Olds*, May 24, 2016, <http://www.pewsocialtrends.org/2016/05/24/for-first-time-in-modern-era-living-with-parents-edges-out-other-living-arrangements-for-18-to-34-year-olds>.

²⁸³ THE COMMITTEE TO PROTECT JOURNALISTS, *BALANCING ACT: PRESS FREEDOM AT RISK AS EU STRUGGLES TO MATCH ACTION WITH VALUES* 41 (2015).

²⁸⁴ *Id.*

²⁸⁵ “The Government is committed to a free and open press and does not interfere with what the press does and does not publish, as long as the press abides by the law.” Blake Neff, *UK Urged to Ban Press from Revealing Terrorists Are Muslim*, THE DAILY CALLER, Oct. 5, 2016, <http://dailycaller.com/2016/10/05/uk-urged-to-ban-press-from-revealing-terrorists-are-muslim>.

with the U.S. a commitment to both retributive punishment²⁸⁶ and the self-government procedures of jury service and self-representation.²⁸⁷ In fact, confidence in their capacity for self-government may have motivated many Brexit voters. Among the factors predicting strongly for a Leave vote was agreement with the statements, “I’d rather put trust in ordinary people than the opinions of experts and intellectuals,” and, “I generally trust the judgements of the British people, even for complicated issues.”²⁸⁸

Americans’ similar distrust of legal elites (and trust in themselves) likewise produced a divergence from Europe in criminal justice and speech law in the past four decades. The *you*-class insisted it could be trusted with the responsibility of presenting evidence as a defendant or weighing it as a juror, and would not necessarily defer to the decisions of counsel and judges. Most significantly, a crime wave exposed the apparent ineffectiveness of the rehabilitation model, which experts had promised would contain crime.²⁸⁹ Americans’ greater capacity for shaping policy enabled them to reject the European model whereby governing elites could forgive violent criminals and send them out to live among unknowing (*T*-class) neighbors. This demand for decision-making responsibility soon affected speech; after Vietnam and Watergate, Americans were less inclined to trust the government to control access to information and restrict its flow.

The CJEU in *Google Spain* acted out of a humanitarian impulse in trying to shield from shame an individual who had failed to pay his debts nearly two decades earlier, assuming that people would give not proper but

²⁸⁶ See *R. v. Secretary of State for the Home Department, ex parte Hindley* [2001] 1 AC 410, 416–417, quoted in *Vinter* 14 (¶ 46) finding “no reason in principle, why a crime or crimes, if sufficiently heinous should not be regarded as deserving lifelong incarceration for purposes of pure punishment,” as there are “crimes so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution”

²⁸⁷ Nina H. B. Jorgensen, *supra* note 15, at 714–17.

²⁸⁸ Ipsos MORI Social Research Institute, *Shifting Ground: new political dividing lines?: The interaction between leave/remain and Conservative/Labour voters* (May 2017), <https://www.ipsos.com/sites/default/files/2017-05/shifting-ground-new-political-dividing-lines.pdf>. The confidence in the “British people” may have contrasted with that in the *European* people, or the British *elite*.

²⁸⁹ Kleinfeld, *supra* note 73, at 1021–24, Keiter, *supra* note 73, at 420–21.

excessive weight to this remote information.²⁹⁰ It followed the path trod by the California Court of Appeal nearly a century earlier in *Melvin v. Reid*, which sought to reify the “charity which should actuate us in our social intercourse.”²⁹¹ But that decision may have had the opposite effect, shielding from public review Darley Melvin’s conduct specifically and prostitution’s harmful effects more generally. In rejecting retributive speech, the *Melvin* decision might have exposed individuals to Melvin’s subsequent mistreatment, and denied the broader public a chance to debate an important public policy issue. California has since renounced that outcome,²⁹² and the eventual consequences of *Google Spain* may someday lead the CJEU to do the same.

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²⁹⁰ Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317.

²⁹¹ 112 Cal. App. 285, 291 (1931).

²⁹² *Gates v. Discovery Communications, Inc.*, 34 Cal.4th 679 (2004).

CALIFORNIA'S NO-DUTY LAW AND ITS NEGATIVE IMPLICATIONS

MICHAELA GOLDSTEIN¹

I. INTRODUCTION

In 1984, Kathleen Peterson, a student at the City College of San Francisco was attacked on a staircase by a non-student assailant hiding in foliage.² The California Supreme Court held that the college had a duty to exercise reasonable care to protect students from reasonably foreseeable assaults on campus.³ Twenty-five years later, in 2009, Katherine Rosen, a student at the University of California, Los Angeles, suffered severe injuries after being attacked by another UCLA student during a chemistry laboratory.⁴ UCLA had ample warning of the assailant-student's propensity for violence and the assailant-student had even made threats directed at Rosen to a UCLA

This paper was awarded first place in the California Supreme Court Historical Society's 2017 CSCHS Selma Moidel Smith Law Student Writing Competition in California Legal History.

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² Peterson v. San Francisco Community College Dist., 685 P.2d 1193 (1984).

³ *Id.*

⁴ Regents of the Univ. of Cal. v. Superior Court (UC Regents), 193 Cal. Rptr. 3d 447, 450 (Cal. App. 2015).

teaching assistant.⁵ However, the California Court of Appeal held that although the attack may have been foreseeable, UCLA was under no duty to protect Rosen from this attack.⁶

Although these cases seem incompatible, they were both decided according to settled, good law. These cases highlight the anomalous exceptions harbored within California's inconsistent no-duty rule. "The general rule in California is that everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . ." ⁷ However, rather than the parties' focusing on whether the defendant fell below the standard of care, and therefore breached its duty, the parties spend much of their time establishing whether a duty exists. California has partaken in a flawed, fundamental move away from deciding negligence cases based on whether a defendant breached its duty of care. Instead, California courts wrongfully focus on the first element of negligence: whether a duty exists. In doing so, California has created an intricate, inconsistent common law surrounding whether a duty exists. Often, cases are won and lost on summary judgment on whether a duty exists — a question of law. Deciding negligence cases on summary judgment inevitably leads to cases being removed from the hands of the jury.

This article takes the position that California courts should rely more heavily on the general rule that a duty is presumed and, instead, focus their analytical attention on whether the defendant has breached its duty of care. Part II explains the history of negligence law generally. Additionally, Part II explores the history of negligence law specifically in California and the historical background of the promulgation of the no-duty rule. Part III evaluates the consequences of California's reliance on the no-duty rule — mainly the removal of negligence cases from the hands of the jury and California's creation of a complex common law surrounding duty with confusing exceptions. Additionally, Part III looks to the cases that will be heard by the California Supreme Court in its 2017 term that are based on whether a duty exists — exploring how California's reliance on the no-duty rule has led to narrow exceptions being created in what should be

⁵ *Id.* at 453.

⁶ *Id.* at 451.

⁷ *Vasilenko v. Grace Family Church*, (*Vasilenko v. Church*), 203 Cal. Rptr. 3d 536, 540 (2016), quoting CAL. CIV. CODE § 1714, subd. (a) (internal quotations omitted).

a general presumption that the defendant owes a duty. Further, Part III contains a discussion of the implications of the no-duty rule, including how the no-duty rule violates one of the main goals of tort law: deterrence. Lastly, Part IV will conclude and recommend that California should move away from the flawed no-duty rule and instead focus on whether a defendant has breached its duty of reasonable care.

II. HISTORICAL BACKGROUND

A. HISTORY OF NEGLIGENCE GENERALLY

Negligence did not appear as a general system for resolving tort actions until the nineteenth century, mostly after the American Civil War.⁸ Prior to the development of negligence as a cause of action, physical injury or harm to property cases were rooted in trespass law.⁹ In these cases, the relationship between the parties to a case was important for two reasons: first, because that relationship between the plaintiff and the defendant might require that the defendant take affirmative actions to prevent harm to the plaintiff;¹⁰ second, the “standard of care or duty owed by the defendant was implicitly set by accepted community practices and expectations as incorporated in the contract or relationship itself.”¹¹ Given that duties in these cases “tended to find their source in community custom and conduct of the parties, courts naturally did not impose any universal principles of responsibility.”¹² Instead, the courts “imposed liabilities they thought proportioned to the parties’ own contract or expectation.”¹³

Beginning in the nineteenth century, the modern formation of negligence law emerged.¹⁴ Courts began to develop general principles to be applied to personal injury or harm to property cases.¹⁵ Instead of cases being

⁸ DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 121 (2d ed. Practitioner Treatise Series 2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See DOBBS ET AL., *supra* note 8, § 122.

judged “by imposing particular duties upon particular callings, courts could simply treat negligence as the basis of liability in all or a large universe of cases.”¹⁶ A tort of trespass was maintained, but negligence became the basis of liability otherwise.¹⁷ Further, negligence did not focus on parties who stood in some special or contractual relationship; negligence was “a general duty of all to all.”¹⁸

In 1850, *Brown v. Kendall* was decided and became the basis of negligence law. In the case, the Massachusetts Supreme Court abolished the rule “that a direct physical injury entailed strict liability.”¹⁹ The court held that a defendant who attempted to beat a dog but unintentionally struck the plaintiff instead, would not be liable for battery in spite of the direct force applied.²⁰ Instead, the defendant would only be liable for battery if his *intention* was to strike the plaintiff, or if he was “at fault in striking him.”²¹ This meant that other direct applications of force, such as “in railroad accidents or industrial injuries, would not automatically subject the defendant to the threat of liability; instead, the plaintiff would be required to prove fault.”²² With the decision in *Brown v. Kendall*, negligence law developed. Courts began to view tort law as a separate area of the law, with the core inquiry being whether the defendant was at fault.²³

In modern law, the term *negligence* merely describes unreasonably risky conduct.²⁴ “A good deal of tort law is devoted to deciding what counts as an unreasonable risk and to deciding as well whether the judge or the jury is the decision maker in particular cases.”²⁵ A negligence case has five elements, which must be proved by the plaintiff by proof of facts or persuasion. The elements are:

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; see G. EDWARD WHITE, *TORT LAW IN AMERICA* 16 (1980); Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127 (1990).

¹⁹ See DOBBS ET AL., *supra* note 8, § 122; *Brown v. Kendall*, 60 Mass. 292 (1850).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See DOBBS ET AL., *supra* note 8, § 122.

²⁴ *Id.* at § 124.

²⁵ *Id.*

(1) The defendant owed the plaintiff a duty to exercise some degree of care for the plaintiff's safety; (2) The defendant breached that duty by his unreasonably risky conduct; (3) The defendant's conduct in fact caused harm to the plaintiff; (4) The defendant's conduct was not only a cause in fact of the plaintiff's harm but also a "proximate cause," meaning that the defendant's conduct is perceived to have a significant relationship to the harm suffered by the plaintiff, in particular that the harm caused was the general kind of harm the defendant negligently risked; and (5) The existence and amount of damages, based on actual harm of a legally recognized kind such as physical injury to person or property.²⁶

Whether or not the defendant owed the plaintiff a duty to exercise some degree of care for the plaintiff's safety is a matter of law, which is decided by a judge.²⁷ To say that the defendant is under a duty is merely to say "that the defendant should be subject to potential liability in the type of case in question."²⁸ "[D]uty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."²⁹ Legal scholars have agreed that "[a] general duty of *reasonable* care is by definition not burdensome."³⁰ And in most negligence cases, "the elaborate efforts to describe particular duties are both unnecessary and undesirable."³¹

B. HISTORY OF NEGLIGENCE IN CALIFORNIA

In the 1980s, California "was at the forefront of the movement to sweep aside duty limitations rooted in property and contract law."³² The general rule in California today is that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the

²⁶ *Id.*

²⁷ *Id.* at § 255.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at § 255.

³¹ *Id.*

³² Dilan A. Esper and Gregory C. Keating, *Abusing "Duty,"* 79 S. CAL. L. REV. 265, 289 (2006).

management of his or her property or person”³³ In other words, “each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances”³⁴ However, in 1968, the California Supreme Court decided *Rowland v. Christian*, which set forth factors for a judge to consider in determining whether a duty exists.³⁵ *Rowland v. Christian* spawned an overthrow of the traditional categories — invitee, licensee, and trespasser, by which the duties owed to entrants on real property were determined in the nineteenth century and the first two-thirds of the twentieth century.³⁶

In *Rowland v. Christian*, the defendant told the lessors of her apartment that the knob of the cold-water faucet in the bathroom was cracked and should be replaced.³⁷ A few weeks later, the plaintiff entered the defendant’s apartment and was injured while using the bathroom faucet.³⁸ The plaintiff alleged that the defendant was aware of the dangerous condition on her property and that his injuries were proximately caused by the defendant.³⁹ The defendant moved for summary judgment.⁴⁰

The court looked at the general rule in California, that “[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct.”⁴¹ The court then reasoned that

[a]lthough it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.⁴²

³³ CAL. CIV. CODE § 1714, subd. (a).

³⁴ *Vasilenko v. Church*, 203 Cal. Rptr. 3d 536, 540 (2016), citing *Cabral v. Ralphs Grocery Co.*, 122 Cal. Rptr. 313, 317 (2011) (internal quotations omitted).

³⁵ *Rowland v. Christian*, 70 Cal. Rptr. 97 (1968).

³⁶ See *Esper and Keating*, *supra* note 32, at 276.

³⁷ *Rowland v. Christian*, 70 Cal. Rptr. at 98.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 97.

⁴² *Id.* at 100.

The court then stated factors which should be balanced in determining if the public policy clearly supports an exception to the general rule.⁴³ The *Rowland v. Christian* factors include: (1) The foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved,⁴⁴ the most important factor being whether the harm to the plaintiff was foreseeable.⁴⁵

The court enunciated a turn away from the traditional categories of duty applied to invitees, licensees, and trespassers, and instead moved to an analysis more centered on the *Rowland v. Christian* factors. The court then concluded that here the correct inquiry was whether, in the management of his property, the defendant acted as a reasonable person in view of probability of injuries to others.⁴⁶ Further, the court concluded that the plaintiff's status as a trespasser, licensee, or invitee was not determinative.⁴⁷ The last issue was whether the tenant had been negligent in failing to warn the plaintiff that the faucet handle was defective and dangerous at the time that the plaintiff was about to come in contact with the faucet handle.⁴⁸ The court remanded for determination of this specific issue.⁴⁹

Since *Rowland v. Christian*, courts have relied on the *Rowland v. Christian* factors to determine whether an exception to the general duty of care rule exists. Today, courts will only make an exception to California Civil Code section 1714's general duty of ordinary care rule "when foreseeability and policy considerations justify a categorical no-duty rule."⁵⁰ Thus, the California Supreme Court intended to create a "crucial distinction between a determination that the defendant owed the plaintiff no duty of

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 105.

⁵⁰ *Cabral v. Ralph's Grocery*, 122 Cal. Rptr. at 319.

ordinary care, which is for the court to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the jury to make.”⁵¹

However, because duty is a live element in every negligence case, as opposed to “[the] general rule in California is that everyone is responsible . . . for [their negligence],” it becomes difficult to know when the issue of duty does or does not arise.⁵² This is where the California courts make their most fatal error: the courts have created very specific factual circumstances where there is no duty, which undoubtedly creates complex and narrow exceptions to what is supposed to be a general presumption of duty. From the precedential narrow factual circumstances where the court has held that the defendant is under *no duty of care as a matter of law*, the courts must then determine whether other narrow factual circumstances are similar enough to the previous narrow factual circumstance to warrant a no-duty ruling. However, this determination of fact is essentially an issue for the jury. Whether or not a duty exists is supposed to be determined on a categorical basis; instead, judges are determining an essentially factual issue, which is reserved for the jury.

Today, many negligence cases are decided on summary judgment on the narrow issue of whether a duty exists. Thus, the *Rowland v. Christian* factors, which were supposed to be used in a very narrow set of circumstances to clear up confusion over the previous invitee, licensee, and trespasser categorical rules, have merely created another complicated area of law.

C. HISTORY OF THE NO-DUTY RULE

Judge William Andrews’ legendary dissent in *Palsgraf v. Long Island Railroad Co.* highlights the long-time debate over the analytical focus on duty rather than breach.⁵³ In *Palsgraf*, a passenger was boarding a train holding a box.⁵⁴ The defendant’s employee, while attempting to help the passenger board the train, knocked the box out of the passenger’s hands, and, unbeknownst to the employee, the box contained some form of bomb, which

⁵¹ *Id.*

⁵² *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 540, quoting CAL. CIV. CODE § 1714, subd. (a) (internal quotations omitted).

⁵³ *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

⁵⁴ *Id.*

exploded.⁵⁵ The explosion broke some scales on the platform a considerable distance away, causing the scales to fall and strike the plaintiff.⁵⁶ The issue, among many, was whether the defendant owed a duty of care to a particular person or persons.⁵⁷ Although the appellate court held for the defendant in its majority opinion, which was written by Judge Benjamin Cardozo — disregarding Judge Andrews' fervent dissent — it is Judge Andrews' dissent that represents the majority view today.

Judge Andrews asserted that whenever there is an unreasonable act and some right that may be affected, there is negligence, whether damage does or does not result.⁵⁸ Judge Andrews offered this example: if someone drove down Broadway at a reckless speed, the person is negligent whether or not the person strikes an approaching car.⁵⁹ It is immaterial whether damage occurs; the act itself is wrongful.⁶⁰ Judge Andrews posited that “[t]he measure of the defendant’s duty in determining whether a wrong has been committed is one thing, the measure of liability when a wrong has been committed is another.”⁶¹

The California negligence duty of reasonable care is supposed to be predicated upon “our common status as human beings” rather than narrow exceptions announced by judges.⁶² Duty “is owed by everyone to everyone else and it is ordinarily triggered simply by acting in a way that poses a ‘reasonably foreseeable’ risk of harm to anyone else.”⁶³ In contrast to duty, breach “is an inquiry into whether a defendant exercised reasonable care in light of all of the foreseeable risks at hand.”⁶⁴ Additionally, when the harm that the plaintiff suffers is not expected, this issue is best explored in the element of proximate cause, not duty.⁶⁵ Using this accurate explanation of

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 102, quoting Justice Holmes, *Spade v. Lynn & B.R. Co.*, 52 N.E. 747, 748 (1899).

⁶² Dilan A. Esper and Gregory C. Keating, *Putting “Duty” In Its Place: A Reply to Professors Goldberg and Zipursky*, 41 LOY. L.A. L. REV. 1225, 1255 (2008).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

the roles of the negligence elements, California should recognize that there is “a general duty of all to all” and focus any additional inquiry of foreseeability or unexpected harm into the appropriate elements.⁶⁶

Palsgraf represents the beginning of a debate over the duty-versus-breach analysis in negligence law. Judge Cardozo’s interpretation of duty has splintered the element of duty into an “indefinite and ill-defined set of duties.”⁶⁷ This splintering of duty has blurred the lines between duty, breach, and proximate cause.⁶⁸ Although California technically follows Judge Andrews’ dissent, California has fallen into Judge Cardozo’s “indefinite and ill-defined set of duties.”⁶⁹ California should revert to following Judge Andrews’ advice, and focus on the breach analysis.

III. IMPLICATIONS OF THE NO-DUTY RULE

California’s reliance on the no-duty rule has created a multitude of problems. In a series of sharp dissents, Justice Joyce Kennard advanced a concise description of one basic problem with California’s reliance on the no-duty rule: it treats problems of breach as problems of duty.⁷⁰ Because the element of duty is a matter of law for the court to determine, California has essentially removed negligence cases from the jury by deciding these cases on whether a duty exists. Second, the old saying *hard cases make bad law* rings true. California courts have carved out narrow and complex exceptions to the duty element in order to protect plaintiffs and defendants. Because the case could not be decided on the more fact-specific, jury-dependent, inquiry of whether the defendant breached their duty, the court defaulted to creating narrow exceptions in whether a defendant owes a duty. The difficulty in burying the duty element in exceptions is very

⁶⁶ See DOBBS ET AL., *supra* note 8, § 122; WHITE, *supra* note 18, at 16; Kaczorowski, *supra* note 18, at 1127.

⁶⁷ See Esper and Keating, *supra* note 62, at 1255 (internal quotations omitted).

⁶⁸ *Id.*

⁶⁹ See DOBBS ET AL., *supra* note 8, § 122; WHITE, *supra* note 18, at 16; Kaczorowski, *supra* note 18, at 1127.

⁷⁰ See Esper and Keating, *supra* note 32, at 323, citing Parsons, 936 P.2d at 101 (Kennard, J., dissenting); Ky. Fried Chicken of Cal., Inc. v. Superior Court (KFC), 927 P.2d 1260, 1275 (cal. 1997) (Kennard, J., dissenting); Knight v. Jewett, 834 P.2d 696, 714 (Cal. 1992) (Kennard, J., dissenting).

apparent in 2017, when the California Supreme Court is set to hear two cases on the very limited issue of whether a duty exists.

Lastly, California courts' reliance on strange and anomalous exceptions to the general rule of presumption of duty has led to courts' analyzing narrow exceptions to determine if a certain factual pattern fits into one of the narrow exceptions previously espoused by the courts. This has led to inconsistent holdings, which go against one of the main goals of tort law: deterrence.

A. REMOVING CASES FROM THE HANDS OF THE JURY

"When duty is a live issue in every case, it is impossible to draw a principled line between the provinces of judge and jury."⁷¹ California's reliance on the no-duty rule has led courts away from a determination of whether the defendant fell below the standard of care and breached their duty. Instead, courts now focus on the issue of whether a duty exists, delving into intricate analyses of special relationships,⁷² the difference between dangerous landscape versus dangerous fraternity brothers,⁷³ or any of a multitude of other narrow exceptions rooted in duty. In doing so, California courts have taken many negligence cases out of the hands of the jury.

Negligence law divides determinations into two parts: duty is a matter of law decided by the judge, and breach is a matter of fact decided by the jury. In negligence cases, "[j]uries are in part a well-chosen instrument for determining whether the defendant did in fact act reasonably and in part an intrinsically fair way of resolving reasonable disagreement about what care was due."⁷⁴ "They are a well-chosen instrument because juries represent a form of collective judgment particularly appropriate to negligence cases."⁷⁵ Judges are better suited than jurors to ruling on questions of law, or to ruling on issues of whether an expert's testimony is admissible or whether the question does in fact call for hearsay. However, when it comes to determining reasonableness, jurors are likely better suited. In determining whether

⁷¹ See Esper and Keating, *supra* note 62, at 1255.

⁷² Crow v. State of Cal., 271 Cal. Rptr. 349, 359 (Cal. App. 1990).

⁷³ Peterson v. San Francisco Community College Dist., 685 P.2d 1193 (1984); Furek v. Univ. of Delaware, 594 A.2d 506, 522 (Del. 1991).

⁷⁴ See Esper and Keating, *supra* note 62, at 1279.

⁷⁵ *Id.*

a driver acted unreasonably in changing lanes too slowly on the freeway, a judge is not better suited to make this determination:⁷⁶

The consensus of twelve citizens, many of whom drive on similar freeways and have had the common experience of driving too slow for a fast lane, as well as the experience of driving behind someone who was doing so, is a reliable index of the reasonableness of a driver's actions in those situations.⁷⁷

However, when courts decide negligence cases solely on the issue of duty, while considering the *Rowland v. Christian* factors, they are removing the jury inquiry from the case. "When reasonable people might reasonably disagree over the application of the law articulated by judges to the facts of a particular case, courts do not have the legitimate authority to decide the matter."⁷⁸ Instead, it is the essential role of the jury to decide issues over which reasonable people can differ. According to the California Constitution, "[t]rial by jury is an inviolate right and shall be secured to all."⁷⁹ By wrongly removing negligence cases from the hands of the jury, California courts are violating a party's *inviolable right* to trial by jury.

B. CALIFORNIA'S SUPREME COURT DOCKET 2017

California's reliance on a no-duty rule has created a difficult to navigate common law surrounding the element of duty. Because of this, the California Supreme Court is constantly hearing cases on whether a duty exists, attempting to smooth out inconsistencies in the current law. For the 2017–18 term, the California Supreme Court will be hearing two cases on the issue of whether a duty exists: *Regents of the University of California v. Superior Court* and *Vasilenko v. Grace Family Church*.⁸⁰ Both of these cases could be decided easily by holding that the general rule applies: "that everyone is responsible . . . for an injury occasioned to another by

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ CAL. CONST. art. 1, § 16.

⁸⁰ *Regents of Univ. of California v. S.C.*, 364 P.3d 174 (2016); *Vasilenko v. Grace Family Church*, 381 P. 3d 229 (2016).

his or her want of ordinary care or skill in the management of his or her property or person”⁸¹

1. *UC Regents*

Katherine Rosen, a student at the University of California, Los Angeles (UCLA), suffered severe injuries after being attacked by another student, Damon Thompson, during a chemistry laboratory.⁸² Beginning in the fall of 2008, Thompson began submitting complaints that students were making sexual advances toward him, calling him names, and questioning his intelligence.⁸³ Thompson warned the dean of students that if the university failed to discipline the students, the matter would likely “escalate” and would cause Thompson to act in a manner that would incur undesirable consequences.⁸⁴ After Thompson sent emails to multiple professors alleging that students were attempting to distract him by making offensive comments, Thompson was encouraged to seek medical help at UCLA’s Counseling and Psychological Services (CAPS), an on-campus center with trained psychologists who address the mental health needs of students.⁸⁵

In February, Thompson informed his dormitory resident director that he heard clicking sounds he believed came from a gun.⁸⁶ Thompson told the resident director that his father had advised him that he could hurt the other residents in response to these incidents.⁸⁷ Thompson stated that he had thought about it but decided not to do anything.⁸⁸

The resident director contacted campus police in response to the incident.⁸⁹ Finding no gun, the officers recommended that Thompson undergo a medical evaluation.⁹⁰ At the psychiatric evaluation, Thompson

⁸¹ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 540, quoting CAL. CIV. CODE § 1714, subd. (a) (internal quotations omitted).

⁸² *UC Regents*, 193 Cal. Rptr. 3d at 450.

⁸³ *Id.* at 451.

⁸⁴ *Id.*

⁸⁵ *Id.*; UCLA COUNSELING AND PSYCHOLOGICAL SERVICES, <http://www.counseling.ucla.edu> (last visited Mar. 20, 2016).

⁸⁶ *Id.*

⁸⁷ *Id.* at 451–52.

⁸⁸ *Id.* at 452.

⁸⁹ *Id.*

⁹⁰ *Id.*

complained of auditory hallucinations, paranoia, and a history of depression.⁹¹ Thompson agreed to take antipsychotic drugs and attend outpatient treatment at CAPS.⁹²

Psychologist Nicole Green believed that Thompson was suffering from schizophrenia but concluded that he did not exhibit suicidal or homicidal ideation and that he had not expressed any intent to harm others.⁹³ Thompson did, however, inform another psychologist that he had previously experienced general ideations of harming others, clarifying that he had never formulated a plan to do so, nor identified a specific victim.⁹⁴

In June 2009, Thompson was involved in an altercation in his dormitory.⁹⁵ According to campus police, Thompson had knocked on the door of a sleeping resident and accused him of making too much noise and then pushed him.⁹⁶ When the sleeping resident informed Thompson that he had not been making noise, Thompson pushed him again stating, “this is your last warning.”⁹⁷ As a result of the incident, Thompson was expelled from university housing and ordered to return to CAPS when the fall quarter began.⁹⁸

During the summer quarter, Thompson sent letters to two chemistry professors alleging that students and university personnel had made negative comments about him.⁹⁹ Although the letters named several individuals, Thompson reported that he intended to ignore the comments and refrain from reacting.¹⁰⁰ When the fall quarter began, Thompson made similar complaints to another chemistry professor.¹⁰¹

On October 6th, a chemistry teaching assistant (TA) reported another incident involving Thompson.¹⁰² According to the TA, Thompson alleged

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 453.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

that a student called him stupid.¹⁰³ Thompson described the student's physical appearance to the TA and insisted that he be provided with the name of the student.¹⁰⁴ The TA told Thompson that he had been present in the laboratory when this incident allegedly occurred and had not heard anyone say anything derogatory about Thompson.¹⁰⁵ The TA informed the professor that Thompson's behavior had become a weekly routine.¹⁰⁶ The professor informed the assistant dean of students who expressed concern that Thompson had identified a specific student in his class whom he believed was against him.¹⁰⁷

On the morning of October 7th, a second chemistry TA emailed the same professor to report that a student from another section (later identified as Thompson) had accused students of verbal harassment.¹⁰⁸ The TA had been present during the incident and did not hear or see any harassment.¹⁰⁹

Two days later, on October 9th, at approximately 12:00 noon, Thompson was working in a chemistry laboratory when he attacked student Katherine Rosen with a kitchen knife.¹¹⁰ When campus police arrived, Thompson told them "they were out to get me" and complained that the other students had been "picking on him."¹¹¹ Thompson also stated that he had been "provoked" by students in the lab who were insulting him, explaining that similar incidents had happened on "several occasions in the past."¹¹²

Rosen told investigating officers that she had been working in the chemistry laboratory for approximately three hours prior to the attack and did not remember having any interactions or conversations with Thompson.¹¹³ Rosen recalled kneeling down to place equipment in her chemistry

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 453–54.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

locker when she suddenly felt someone's hands around her neck.¹¹⁴ Rosen looked up and saw Thompson coming at her with a knife.¹¹⁵ Rosen said she only knew Thompson from the chemistry laboratory and had never insulted him or otherwise provoked him.¹¹⁶

A TA informed an investigating officer that Thompson had approached him on several occasions to complain about students "calling him stupid."¹¹⁷ The TA also stated that on one occasion, Thompson had identified "Rosen as being one of the persons that called him stupid."¹¹⁸

The California appellate court held that, although the attack may have been foreseeable, colleges and universities are under no duty to protect students from physical attacks by other students.¹¹⁹ The California Supreme Court granted the petition for review on January 20, 2016.¹²⁰

a. Appellate Court's Legal Reasoning

The *UC Regents* court was not acting erratically in holding that there was no duty in this specific instance. In fact, the *UC Regents* court was following California law. Currently, the California courts impose a duty on a university if an attack on a student occurs due to a dangerous physical condition on the property,¹²¹ but not if a student threatens another student and carries out that threat.¹²² For example, if an assailant hides in a foreseeably dangerous staircase, behind foliage, and attacks a student, the college is under a duty to have acted reasonably in preventing the attack.¹²³ However, if a student informs university personnel of his intent to attack someone in a chemistry lab and then carries out the foreseeable attack, the university is under *no duty* to have acted reasonably in protecting the student.¹²⁴ This anomalous distinction is not supported by any reasonable explanation, but is a result of California's reliance on the no-duty rule.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *UC Regents*, 193 Cal. Rptr. 3d 447, 450 (Cal. App. 2015).

¹²⁰ *Regents of Univ. of California v. S.C.*, 197 Cal. Rptr. 3d 129 (2016).

¹²¹ *Peterson v. San Francisco Community College Dist.*, 685 P.2d 1193 (1984).

¹²² *UC Regents*, 193 Cal. Rptr. 3d at 450.

¹²³ *Peterson v. San Francisco Community College Dist.*, 685 P.2d at 1193.

¹²⁴ *UC Regents*, 193 Cal. Rptr. 3d at 450.

This reasoning derives from *Crow v. State of California* (“*Crow*”). In *Crow*, the plaintiff had been assaulted by another student while attending a beer party in a student dorm room.¹²⁵ The plaintiff brought suit against the university for her injuries.¹²⁶ The court held that universities do not owe a duty based on a special relationship between student and school.¹²⁷ Instead, the court reasoned that institutions of higher education differ from grammar and high schools because of the non-compulsory attendance and the goal of allowing college students to regulate their own lives.¹²⁸ Later cases relied on *Crow*’s reasoning, holding that institutions of higher education are not under a duty to protect their students from student violence.¹²⁹

The *UC Regents* case highlights a few confusing variations of the no-duty rule as it pertains to students. First, grammar and high school students are owed a duty of care by their schools.¹³⁰ Second, university students are not owed a duty based on their special relationship between school and student.¹³¹ Third, university students are owed a duty if they are attacked because of a dangerous physical condition on the property.¹³² And fourth, university students are not owed a duty if they are attacked by another student, provided it is not a student who is hiding behind a dangerous physical condition on the property.¹³³

b. Other States Have Successfully Moved Away from These Exceptions in College or University Negligence Duties

According to the appellate court in *UC Regents*, California courts rely on these anomalous distinctions concerning when the university will owe its students a duty because the courts are attempting to prevent the

¹²⁵ *Crow v. State of Cal.*, 271 Cal. Rptr. at 351.

¹²⁶ *Id.*

¹²⁷ *Id.* at 359.

¹²⁸ *Id.*; however, California courts do recognize an exception for grammar and high school students. If this fact pattern were to happen to students at a grammar or high school, the special relationship exception would apply and the school would owe a duty of reasonable care to the victim-student.

¹²⁹ *Ochoa v. Cal. State Univ.*, 85 Cal. Rptr. 2d 768 (Cal. App. 1999); *Tanja H. v. Regents of Univ. of Cal.*, 278 Cal. Rptr. 918 (Cal. App. 1991).

¹³⁰ *Crow v. State of Cal.*, 271 Cal. Rptr. at 359.

¹³¹ *Id.*

¹³² *Peterson v. San Francisco Community College Dist.*, 685 P.2d at 1193.

¹³³ *Regents of Univ. of California v. S.C.*, 197 Cal. Rptr. 3d 129 (2016).

regulation of college students' lives by universities and colleges.¹³⁴ However, other states have successfully imposed a duty on colleges to protect students from negligence, which has not led to close regulation of college students' lives. For example, in *Nero v. Kansas State University*, a student was sexually assaulted in a residence hall by another student.¹³⁵ The *Nero* court looked to California precedent but determined that "a university has a duty of reasonable care to protect a student against certain dangers, including criminal actions against a student by another student or a third party if the criminal act is reasonably foreseeable and within the university's control."¹³⁶ Therefore, the court imposed a duty of reasonable care on the university.¹³⁷

Similarly, in *Furek v. University of Delaware*, a university student was severely injured in a fraternity hazing event conducted by other students.¹³⁸ The court imposed a duty on the university and held that, although the university is not an insurer of the safety of its students nor a policeman of student morality, the university has a duty to regulate and supervise foreseeable dangerous activities occurring on its property, which extends to the intentional activities of students.¹³⁹

California courts previously reasoned that imposing a duty on colleges to protect students from student-on-student attack would lead to the college's too closely regulating the adult lives of college students.¹⁴⁰ However, other states, such as Kansas and Delaware, have imposed a duty on colleges to protect their students from only foreseeable violence from other students.¹⁴¹ Because these institutions of higher education are only responsible for preventing foreseeable student-on-student violence, this does not require burdensome regulation of adult student lives. "A general duty of *reasonable* care is by definition not burdensome."¹⁴² Instead, colleges and

¹³⁴ *Id.*

¹³⁵ *Nero v. Kansas State Univ.*, 861 P.2d at 768.

¹³⁶ *Id.* at 780.

¹³⁷ *Id.*

¹³⁸ *Furek v. Univ. of Delaware*, 594 A.2d at 522.

¹³⁹ *Id.*

¹⁴⁰ *UC Regents*, 193 Cal. Rptr. 3d at 460.

¹⁴¹ *Furek v. Univ. of Delaware*, 594 A.2d at 522; *Nero v. Kansas State Univ.*, 861 P.2d at 780.

¹⁴² See DOBBS ET AL., *supra* note 8, § 255.

universities are merely being required to prevent *foreseeable* harm from befalling their students.

The argument that California colleges and universities should not be under a duty to prevent student-on-student attacks is baseless. Imposing this duty will not require burdensome regulation of adult college students' lives because there is only a duty to protect against foreseeable violence, not all violence. Additionally, a duty to use reasonable care falls far short of regulating student lives.¹⁴³ The general rule in California is that “[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person”¹⁴⁴ In other words, “each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances”¹⁴⁵ These narrow exceptions to determine whether the college or university owes a duty are unnecessary and merely lead to complex exceptions within what is *supposed to be* a general presumption of a duty of reasonable care.

c. UC Regents at the California Supreme Court

The California Supreme Court will hear *UC Regents* in the 2017–18 term. Currently, there are too many narrow exceptions surrounding whether a college or university will owe a duty to its students. The California Supreme Court has the opportunity to begin to undo the complex common law surrounding narrow exceptions to duty in the context of negligence on college campuses. However, if the California Supreme Court does not abjure reliance on the no-duty rule, and instead push courts to focus on the issue of breach and whether the defendant fell below their standard of care, *UC Regents* will merely provide another narrow exception within the court's negligence duty analysis.

2. Vasilenko v. Church

California's reliance on the no-duty rule not only creates confusing situations regarding college and university negligence liability. In *Vasilenko v.*

¹⁴³ *Id.*

¹⁴⁴ CAL. CIV. CODE § 1714, subd. (a).

¹⁴⁵ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 540, citing *Cabral v. Ralphs Grocery Co.*, 122 Cal. Rptr. at 317 (internal quotations omitted).

Grace Family Church (“*Vasilenko v. Church*”), Aleksandr Vasilenko was hit by a car and injured while crossing Marconi Avenue in Sacramento.¹⁴⁶ At the time the plaintiff was injured, he was crossing a busy five-lane road on his way from an overflow parking lot, controlled and staffed by the defendant Grace Family Church, to an event at the church.¹⁴⁷

The trial court held that there was no duty as a matter of law because the defendant did not control the parking lot.¹⁴⁸ Conversely, the Court of Appeal held that the location of the overflow lot, which required the defendant’s invitees who parked there to cross a busy street in an area that lacked a marked crosswalk or traffic signal in order to reach the church, exposed those invitees to an unreasonable risk



GRACE COMMUNITY CHURCH —
AERIAL VIEW OF THE CHURCH
SHOWING THE OVERFLOW PARKING
LOT IN THE FOREGROUND.

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of injury offsite, thus giving rise to a duty on the part of the defendant.¹⁴⁹ Thus, the appellate court overturned the Superior Court, and held that the defendant owed a duty to the plaintiff to protect him from the dangerous condition of the property.¹⁵⁰ The California Supreme Court granted the petition for review on September 21, 2016.¹⁵¹

a. Legal Reasoning of the Appellate Court

The general rule for landowners is that “[t]hose who own, possess, or control property generally have a duty to exercise ordinary care in managing the property in order to avoid exposing others to an unreasonable risk of

¹⁴⁶ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 538.

¹⁴⁷ *Id.*

¹⁴⁸ *Vasilenko v. Drury*, 2013 WL 12108463.

¹⁴⁹ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 538.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

harm.”¹⁵² Usually, “a landowner has no duty to prevent injury on adjacent property.”¹⁵³ However, dangerous condition on property cases are much more difficult than they seem. Courts often draw distinctions between holding that a duty exists, or holding that as a matter of law no duty exists, depending on whether the risk on the adjacent property was unreasonable,¹⁵⁴ how much control the defendant exerted over the adjacent property,¹⁵⁵ or whether the defendant created the danger.¹⁵⁶

The court in *Vasilenko v. Church* first looked to a similar case, *Barnes v. Black*. In *Barnes v. Black*, a child died after the “big wheel” tricycle he was riding veered off a sidewalk inside the apartment complex where he lived, traveled down a steep driveway and into a busy street where he was struck by an automobile.¹⁵⁷ The sidewalk and the driveway were within the apartment complex, and the four-lane busy street was not.¹⁵⁸ The defendant-landowner argued that he owed no duty to the plaintiff because the injury occurred on a public street and not on the land owned or controlled by the defendant.¹⁵⁹ The plaintiff argued that the defendant-landlord “[owed] its tenants a duty of reasonable care to avoid exposing children playing on the premises to an unreasonable risk of injury on a busy street off the premises and [the defendant] failed” to negate the duty of care.¹⁶⁰

The court held for the plaintiff, imposing a duty on the defendant. The court held that

[a] landowner’s duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or

¹⁵² *Id.*, citing *Alcaarez v. Vece*, 60 Cal. Rptr. 2d 448 (1997).

¹⁵³ *Id.*, citing *Steinmetz v. Stockton City Chamber of Commerce*, 214 Cal. Rptr. 405 (1985).

¹⁵⁴ *Barnes v. Black*, 84 Cal. Rptr. 2d 634, 636 (Cal. App. 1999).

¹⁵⁵ *Steinmetz v. Stockton City Chamber of Commerce*, 214 Cal. Rptr. 405 (1985) (holding that the host of a business party could not be held liable for a criminal assault on a guest that occurred in a nearby parking lot that the host neither owned nor controlled).

¹⁵⁶ *Brooks v. Eugene Burger Management Corp.*, 264 Cal. Rptr. 756 (1989) (holding that the landlord owed no duty to plaintiff to provide fencing or some other means of confining minors to the subject premises).

¹⁵⁷ *Barnes v. Black*, 84 Cal. Rptr. 2d at 636.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site.¹⁶¹

The court determined that even though the child was injured on a *public* street, over which the defendant had no control, this was "not dispositive under the *Rowland* analysis."¹⁶² Further, the court determined that the defendant did not negate the other *Rowland v. Christian* factors, including a failure to introduce evidence that the injury was not foreseeable or that the slope of the driveway or configuration of the sidewalk or play area were not closely connected to the injury.¹⁶³

In *Vasilenko v. Church*, similar to *Barnes v. Black*, the "salient fact is that [the defendant] did not control the public street where [the plaintiff] was injured, but that it *did* control the location and operation of its overflow parking lot, which [the plaintiff] alleges caused or at least contributed to his injury."¹⁶⁴ The court in *Vasilenko v. Church* held that *Barnes v. Black* was very on-point in that the defendant in both cases failed to show that the *Rowland v. Christian* factors had been negated and also failed to show that the defendant did not possess the relevant level of control.¹⁶⁵

Next, the court in *Vasilenko v. Church* distinguished *Nevarez v. Thriftmart*. In *Nevarez v. Thriftmart* the defendant was a grocery store hosting their grand opening.¹⁶⁶ The plaintiff was struck by a car while crossing the street to attend the grand opening.¹⁶⁷ The court held that as a matter of law, there was no duty because the plaintiff was struck on a public street, where the defendant had no control.¹⁶⁸ The court reasoned that "[t]he power to control public streets and regulate traffic lies with the State

¹⁶¹ *Id.*; Additionally, the court held that the fact that the child was injured on a public street over which the defendant had no control was "not dispositive under the *Rowland* analysis," and that the defendant should have offered more evidence of the *Rowland* factors weighing in his favor.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 542.

¹⁶⁵ *Id.*

¹⁶⁶ *Nevarez v. Thriftmart*, 87 Cal. Rptr. 50, 53 (Cal. App. 1970).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

which may delegate local authority to municipalities . . . and only the State . . . or local authorities, when authorized, may erect traffic signs or signals, all other persons being forbidden to do so . . . with some few exceptions.”¹⁶⁹ Additionally, the court pointed out that the defendant also could not “lawfully use barricades to block off traffic on [the street where the accident occurred] or any other abutting street since, to do so, undoubtedly would constitute a public nuisance.”¹⁷⁰ Therefore, the defendant could not have had control over the public street, and the court held there was no duty as a matter of law.¹⁷¹

In *Vasilenko v. Church*, the issue again arises: does a defendant owe a duty when the plaintiff is harmed on an adjacent public street? Here, the trial court held that the defendant did not owe a duty to protect the plaintiff on the public street. The trial court reasoned that the plaintiff “was injured while walking across a public street, not owned or controlled by” the defendant.¹⁷² And therefore held, as in *Nevarez v. Thriftmart*, that “a landowner has no duty to warn of dangers beyond his or her own property when the owner did not create those dangers.”¹⁷³

Conversely, the appellate court reasoned that the defendant did not control the public street where plaintiff-Vasilenko was injured, but it *did* control the location and operation of its overflow parking lot, which gave rise to a duty.¹⁷⁴ The court noted that “while [the Church] may not have had a duty to provide additional parking for its invitees, its maintenance and operation of an overflow parking lot in a location that it knew or should have known would induce and/or require its invitees to cross [the street] created a foreseeable risk of harm to such persons.”¹⁷⁵ Additionally, the court noted that the defendant did not negate any of the relevant *Rowland v. Christian* factors.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 54.

¹⁷² *Vasilenko v. Drury*, 2013 WL 12108463.

¹⁷³ *Id.*, citing *Swann v. Olivier*, 28 Cal. Rptr. 2d 23 (1994); *Brooks v. Eugene Burger Management Corp.*, 264 Cal. Rptr. 756 (1989) (holding that the landlord owed no duty to plaintiff to provide fencing or some other means of confining minors to the subject premises).

¹⁷⁴ *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 544.

¹⁷⁵ *Id.*

b. Replacing a Confusing System with an Equally Confusing System

California was the first state to replace the categories of invitee, licensee, and trespasser with a single standard of reasonable care in *Rowland v. Christian*.¹⁷⁶ Prior to *Rowland v. Christian*, California used a categorical approach drawn from property law to determine the duties owed by landowners to those on their property.¹⁷⁷ The three categories were business invitees, licensees, and trespassers.¹⁷⁸ Business invitees were distinct from the other categories because they conferred an economic benefit on the landowner.¹⁷⁹ Because of this, business invitees were owed the ordinary duty of reasonable care.¹⁸⁰ Conversely, a landowner's social guests were classified as licensees, who were *not* owed a duty of reasonable care.¹⁸¹ Instead, a landowner merely owed licensees a duty to warn of dangers, which were not "open and obvious."¹⁸² Lastly, trespassers, individuals who entered a landowner's property without the permission of the owner, were owed no duty of care at all.¹⁸³

In *Rowland v. Christian*, these categories of land entrants were abolished.¹⁸⁴ There, the California Supreme Court reasoned that by "carving further exceptions out of the traditional rules relating to the liability of licensees or social guests," most jurisdictions ended up with a confusing, unreliable common law.¹⁸⁵ The court held that continuing to evaluate cases based on the rigid categories of land entrants would add to the "confusion, complexities, and fictions . . . [of the] common law distinctions."¹⁸⁶

The dissent in *Rowland v. Christian* was concerned that this would lead to determinations on a case by case basis — arguably the goal of the majority. The majority was seeking a move away from the rigid rules of invitees,

¹⁷⁶ *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976) (noting that *Rowland v. Christian* was the first California Supreme Court case that abandoned the common law distinctions and adopted the simple rule of reasonable care under the circumstances).

¹⁷⁷ See, e.g., *Oettinger v. Stewart*, 148 P.2d 19, 22 (Cal. 1944).

¹⁷⁸ *Id.*

¹⁷⁹ See *Rowland v. Christian*, 443 P.2d at 565.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See generally *id.*

¹⁸³ See *Fernandez v. Consol. Fisheries, Inc.*, 219 P.2d 73, 77 (Cal. App. 1950).

¹⁸⁴ *Rowland v. Christian*, 443 P.2d at 569.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

licensees, and trespassers, which lead to “confusion, complexities, and fictions.”¹⁸⁷ However, rather than follow through with the majority’s goal of reducing narrow exceptions, later courts merely replaced the invitee, licensee, and trespasser exceptions with other exceptions rooted in duty. As demonstrated by *Vasilenko v. Church*, the California courts now rely on very narrow exceptions relating to whether a duty exists. These narrow exceptions should be removed, and any issue of foreseeability and control should instead be evaluated as to whether the defendant breached their duty — making this a case-by-case *jury* determination, as the majority in *Rowland v. Christian* hoped — rather than whether the defendant owed a duty to the plaintiff.

c. Vasilenko v. Church at the California Supreme Court

The California Supreme Court will hear *Vasilenko v. Church* during the 2017–18 term. *Vasilenko v. Church* provides an opportunity for the California Supreme Court to alter the way that the courts approach premises liability negligence claims. The court should hold that the issue present in this case goes to whether the defendant breached its duty, rather than whether the defendant owed the plaintiff a duty. As a general matter, as the appellate court in this case suggests, the defendant should owe the plaintiff a general duty of reasonable care. If the California Supreme Court does not abjure reliance on the no-duty rule, and instead continues to focus the court’s attention on issues of breach rather than whether the defendant fell below their standard of care, *Vasilenko v. Church* will merely provide another narrow exception within the court’s duty analysis.

C. CALIFORNIA’S ANOMALOUS DUTY CATEGORIES UNDERMINE THE GOALS OF TORT LAW

One of the main goals of tort law is deterrence.¹⁸⁸ In order to deter defendants, wrongful defendants must be consistently held liable, and therefore deterred in order to reach this goal. However, a defendant will not be deterred when the inquiry for negligence is bogged down in the legal

¹⁸⁷ *Id.*

¹⁸⁸ *Cenco, Inc., v. Seidman & Seidman*, 686 F.2d 449 (Ct. App. 1982); Jane A. Dall, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 508 (2003).

issue of whether a duty exists, instead of inquiring more appropriately into whether the defendant has breached their duty or if the harm suffered by the plaintiff was proximately caused by the defendant.

For example, in *UC Regents*, UCLA failed to prevent foreseeable violence against one of their students by another student during a UCLA chemistry laboratory. If the California Supreme Court holds that UCLA does not owe a duty to the victim-student, then UCLA has no incentive to prevent foreseeable violence against their students, and UCLA's unreasonable conduct will not be deterred. Alternatively, if UCLA were subject to a large jury verdict or settlement following a failure to protect its students from foreseeable violence, then UCLA's unreasonable conduct would be deterred, satisfying the first goal of tort law.¹⁸⁹

Currently, the California appellate court suggests that universities and colleges may "adopt policies and provide student services that reduce the likelihood" of violent incidents occurring on their campuses; however, the court does not even encourage the adoption of these policies.¹⁹⁰ Here, UCLA is in the best position to implement policies and programs that protect their students, whereas students are unable to bear the burden of protecting themselves from attacks by other students.

Similarly, in premises liability cases, if landowner-defendants presumed that they would owe a duty to the general public, they would be deterred from falling below the standard of care. In *Vasilenko v. Church*, the Superior Court held that as a matter of law the defendant-church had no duty to prevent the harm that befell the plaintiff because the defendant did not control the overflow parking lot.¹⁹¹ On appeal, the court held oppositely, that as a matter of law a duty does exist.¹⁹² In order to deter the defendant from foreseeably risking harm to people traveling from the overflow parking lot to the church, it is necessary that the defendant owe a duty. Here, the defendant-church is in the best position to provide for crossing guards, a marked crosswalk, or other features to protect the churchgoers from foreseeable harm. Without the imposition of a duty, the church and similar defendants will be under-deterred, which infringes on one of the main goals of tort law.

¹⁸⁹ *Id.*

¹⁹⁰ *UC Regents*, 193 Cal. Rptr. 3d at 461.

¹⁹¹ *Vasilenko v. Drury*, 2013 WL 12108463.

¹⁹² *Vasilenko v. Church*, 203 Cal. Rptr. 3d at 538.

IV. RECOMMENDATION

This article proposes that California courts should seek to end their reliance on the no-duty rule, and instead focus the courts' attention on whether the defendant has breached its duty of reasonable care to the plaintiff. In doing so, California will move away from the inconsistent and arbitrary no-duty rule which currently exists in California. The "[d]uty doctrine must be used to fix the boundaries among contract, tort, property, and legally unregulated conduct, and to articulate the more particular standards of care owed by certain positions, or incurred by certain undertakings."¹⁹³

California should return to the general rule that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person"¹⁹⁴ In other words, "each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances"¹⁹⁵ In doing so, California will return negligence cases to the jury and refocus the analysis on whether a defendant has breached their duty of care, rather than litigating the intricacies of the no-duty rule in front of a judge. In California, the duty of reasonable care is supposed to be predicated upon "our common status as human beings" rather than narrow exceptions announced by judges.¹⁹⁶ Duty "is owed by everyone to everyone else and it is ordinarily triggered simply by acting in a way that poses a 'reasonably foreseeable' risk of harm to anyone else."¹⁹⁷ In contrast to duty, breach "is an inquiry into whether a defendant exercised reasonable care in light of all of the foreseeable risks at hand."¹⁹⁸ Additionally, when the harm that the plaintiff suffers is not expected, this issue is best explored in the element of proximate cause, not duty.¹⁹⁹ Using this explanation of the roles of the negligence elements, California should recognize

¹⁹³ See Esper and Keating, *supra* note 32, at 273.

¹⁹⁴ CAL. CIV. CODE § 1714, subd. (a).

¹⁹⁵ Vasilenko v. Church, 203 Cal. Rptr. 3d at 540, citing Cabral v. Ralphs Grocery Co., 122 Cal. Rptr. at 317 (internal quotations omitted).

¹⁹⁶ See Esper and Keating, *supra* note 62, at 1255.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

that there is “a general duty of all to all” and focus any additional inquiry of foreseeability or unexpected harm on the appropriate elements.²⁰⁰

As legal scholars have expressed, “[t]he elaborate balancing test of *Rowland* is misplaced.”²⁰¹ “A general duty of *reasonable* care is by definition not burdensome.”²⁰² Additionally, the imposition of a general duty of reasonable care does not “leave juries free to bring in irrational verdicts, because the judge remains free to direct a verdict when, on the facts of a particular case, reasonable people could not differ.”²⁰³ The California Supreme Court can begin to remedy the anomalous exceptions in whether a duty exists in the 2017–18 Supreme Court term, by utilizing the two duty cases before the court. The California Supreme Court should hold that a duty generally exists and move the more specific inquiry into whether the defendant breached their duty. By doing so, the California Supreme Court will begin to redirect the analysis to the jury question of whether the defendant breached its duty of reasonable care to the plaintiff.

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EDITOR’S NOTE

As of the end of 2017, the Supreme Court had scheduled *Regents of the University of California v. Superior Court (Rosen)* for oral argument on January 3, 2018, and had issued a unanimous decision in *Vasilenko v. Grace Family Church* in favor of the appellant church (No. S235412, November 13, 2017) that concludes with the statement:

Vasilenko argues that the Court of Appeal’s decision should be affirmed on the alternative ground that the Church voluntarily assumed a duty to assist him in crossing Marconi Avenue. This argument was not presented to the trial court, and although the parties briefed it before the Court of Appeal, that court found the Church owed Vasilenko a duty under Civil Code section 1714 and

²⁰⁰ See DOBBS ET AL., *supra* note 8, § 122; WHITE, *supra* note 18, at 16; Kaczorowski, *supra* note 18, at 1127.

²⁰¹ See Esper and Keating, *supra* note 32, at 327.

²⁰² See DOBBS ET AL., *supra* note 8, § 255.

²⁰³ *Id.*

did not reach the alternative argument. We granted review only on the issue of a landowner's duty to its invitees when it directs those invitees to use its parking lot across the street. We decline to address whether the Church, by its alleged actions, voluntarily assumed a duty. The Court of Appeal on remand may consider this argument if Vasilenko elects to pursue it.

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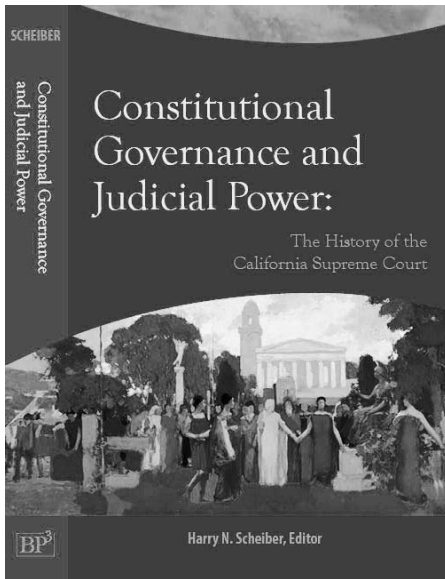
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